NOVEMBER 1961 • Volume 47 • Number 11

American Bar Association JOURNAL

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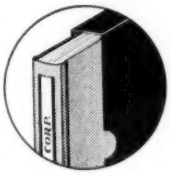

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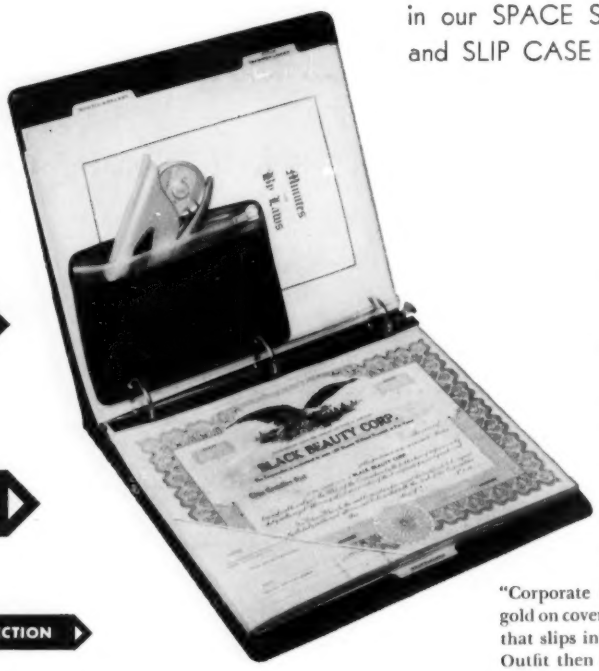

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November, 1961

Table of Contents

VOLUME 47
No. 11

American Bar Association JOURNAL

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.

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The President's Page

John C. Satterfield

For several months, the Membership Committee had been studying the question of whether the American Bar Association is warranted in making an effort on a national scale to increase substantially its membership during the current Association year or should simply permit a gradual increase of membership under routine procedures.

The Committee has been advised by Martindale-Hubbell that 286,003 persons have been admitted to practice law in the United States, of whom 250,203 are listed as being active. If one half of the listed lawyers were enrolled in the Association, we should have a membership in excess of 125,000.

History is a continuous story of organizations that have died of their own complacency. If the American Bar Association is not doing a vital job in answering a vital need, it has no valid reason for existence, and time will provide its stock solution, the atrophy of disuse. If it is doing a vital job, then it can rightfully command the respect and support of the entire profession. It is essential that the strength of the Association be increased, not only so that it can better serve its own members, but also so it can better perform its function in the front lines of the defense of democracy.

Study reveals that among the nonmembers of the Association, there are 86,367 individual practitioners, 31,935 members of partnerships or associates, 17,672 in government service, 5,064 serving in judicial capacity, and 16,354 in salaried positions. Of course, the greatest potential lies in the 86,367 lawyers who, as individuals in the private practice, do not receive the benefit of the services rendered by the American Bar Association.

Each member of the Association necessarily believes, as evidenced by his membership, that it is worthwhile and desirable. The reason that there are more than 147,000 lawyers who do not belong to our Association is that we have not taken the time to convince the other members of our profession that it is worthwhile to join our Association. The Membership Committee is forming a "Committee of 1,000", each member of which will pledge himself to use every effort to obtain 25 new members during the present year. Already, 316 members of the Association have become members of the Committee of 1000, and it is expected that the committee will be completed within the next few weeks.

There are 102,678 lawyers in the United States who believe that it is their personal responsibility and to their personal interest to be members of the American Bar Association. There are 147,525 lawyers who, as of today, have not yet arrived at that opinion. If we, who are members, are correct in our conclusion, we should be able to convince those lawyers who are not members of the Association that the services which we render to our country, our profession and our members warrant their joining the Association.

If we had done as good a job as one of our kindred professions, 83 per cent of the lawyers or 208,218 would be members, and if we had done as good a job as the members of another kindred profession, 86 per cent or 215,218 would be members.

The Membership Committee is convinced, and I am in agreement with it, that the basic reason we do not have between 150,000 and 200,000 members of the Association today is that we, who are members, have been too busy or too indifferent to acquaint the lawyers who do not belong with the value of membership.

As was said by one of our leaders many months ago, our time and our training, which is our only stock in trade, have gone in unnumbered instances toward the betterment of our communities, our state and our nation. But what about our profession? What about our obligation to ourselves and to each other? Sadly these things are often overlooked. The great force that comes from a strong and well-organized American Bar Association is hampered and frustrated by lack of membership. Lawyers of goodwill and good intention let the years slip by without joining. They mean to; as highly trained professionals they know and understand the strength that comes of organization—but they just put it off.

Many of our practical minded brothers ask, "What's in it for me?" The answer applies to us all. It is the giving of strength to our profession and putting that strength into practical form by supporting the organization that has as its sole dedicated function the well-being of the American Bar. The maintenance of a strong bar association is the only way that we, as lawyers, can see to it that our profession keeps pace with the increased recognition—both financially and otherwise—that is going to the other professions. It is the only way to insure that our impact on the American scene will not diminish and eventually be replaced by those professions more able or more willing to gain strength and recognition through the support of a strong national organization that is representative of their interests.

It is inconceivable that any lawyer with full knowledge of the facts would believe that it is not worth $20.00 to him to be eligible to take advantage of the group life insurance provided

(Continued on page 1121)

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Journal Board Censored

Without doubt, the duty of the *American Bar Association Journal* is to print articles of varying worth representing different points of view on legal subjects.

However, having read Mr. King's facetiously named and philosophically unsound article, 47 A.B.A.J. 668, I feel that I must in conscience register a protest. I cannot help but feel that anyone with the slightest sensitivity would reject his proposed solution of legally encouraged suicide as being morally objectionable; to me, it would be a clear violation of the natural law which binds all men.

I feel that the editorial board of the *American Bar Association Journal* is open to severe and justified criticism for permitting Mr. King's article to be published without, at the same time, giving at least equal space to a reasoned and reasonable refutation thereof in the same issue.

MAURICE ADELMAN, JR.
Cincinnati, Ohio

Capital Punishment in England

I wish to call attention to the following factual mistake in Mr. Rubin's contribution, published in the September issue of the *Journal* under "Predicts Abolition of Capital Punishment". He writes: "England has very recently dispensed with capital punishment . . ." This is certainly not true. The English Homicide Act of 1957, discussed at length by me in the April, 1960, issue of the *Missouri Law Review*, did not abolish capital punishment, but merely reduced the possibility of imposing the death sentence for murder. It introduced in England something similar to the American categories of first and second degree murder by specifying the types of murder that should remain subject to the death penalty, at variance with all the other types that are now non-capital murder. It thus accomplished a compromise between the views of the so-called "abolitionists" and the so-called "retentionists". And while the execution of death sentences was prior to that enactment *de facto* suspended in England for a certain period of time, death sentences have since that enactment been executed there.

MAXIMILIAN KOESSLER
San Francisco, California

"Peace Everywhere Except in the Hearts of Men"

On my return from St. Louis I found the August issue of the *Journal*, on page 752 of which appears a letter from John Wayne Lasley, of Chapel Hill, North Carolina.

In the first sentence he says ". . . there exists a highly vocal group of lawyers that opposes the extension of the rule of law". He then refers to the vote in Washington, D. C., concerning the proposed repeal of the Connally Reservation. His statement is corrected by your note.

Mr. Lasley's conclusion that those of us who desire to retain the Connally Reservation to protect American rights are opposed to the rule of law is a *non sequitur* and a false conclusion. The fact is that those of us who desire to retain the Connally Reservation are the ones who desire the rule of law.

The slogan is "World Peace Through World Law". There is no peace in the hearts of men, and there is no world law. In support of this statement I present the following:

(1) At Los Angeles in 1958 the American Bar Association Committee on World Peace Through World Law was created because the lawyers who proposed the committee stated there was no world law and the committee was to endeavor to create such world law. The first meeting for that purpose was recently held.

(2) See the article in the December, 1960, issue of the *American Bar Association Journal*, page 1,300, entitled "World Peace Through World Law: the Bedrock of the Problem", written by Harold A. Jones.

(3) Dean John Henry Wigmore published a three-volume work in 1938 entitled *A Panorama of the World's Legal Systems*. Dean Wigmore discusses sixteen legal systems. He finds six of them have died, leaving ten now operating in the world. In the appendix he lists all of the nations of the world, and shows which system of law each nation has. In most cases the present system is the combination of two or more of the ten he referred to. Thus the confusion is confounded by not only ten systems, but various mixtures of them.

(4) Something more is needed than a system of law. Jesus, the Christ, lived almost 2,000 years ago. Christianity has been active almost that long. We have all kinds of laws on the statute books against murder, robbery, etc., and yet crime increases.

Before any system of law is going to be effective, the hearts of men must be regenerated. This applies to world law as well as local law. On the trip to St. Louis I read a book in which is described a man looking at the peaceful countryside, and then he thinks of the feuds between a number of the inhabitants of the neighborhood and he ends with this sentence: "Peace everywhere except in the hearts of men."

How can there be World Peace Through World Law when one lawyer accuses other patriotic lawyers of be-

(Continued on page 1055)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar: Local Government Law; Mineral and Natural Resources Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $20.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $5.00 per year, and for three years thereafter $10.00 per year, each of which includes the subscription price of the *Journal*. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Local Government Law, $5.00; Mineral and Natural Resources Law, $7.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $20.00 for lawyers first admitted to the Bar in 1956 or before: $10.00 for lawyers admitted in 1957, 1958 and 1959; and $5.00 for lawyers admitted in 1960 or later.

Manuscripts for the Journal

■ The *Journal* is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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(Continued from page 1050)

ing against the extension of law because they desire to protect their own country?

GEORGE W. NILSSON
Los Angeles, California

A Strong Advocate for Specialization

I am going to criticize.

The leading article in the August, 1961, issue should have been "Pardon Me, Your Image Is Showing—A Letter", by Frank Bain, which appeared on page 785, and this should have been the subject of the leading editorial.

Frank Bain got to the bottom of things. We lawyers have never put any kind of a foot forward, to say nothing of a good foot. Oh, I know there have been spasmodic timid efforts. The only real attempt of which I've heard is in Minnesota. They have *doubled* their lawyers' incomes in eight years. See page 771 of your August issue.

As I see it, with help from Frank Bain: First we have to sell the idea that lawyers' work is necessary *and* valuable to the public, and at the same time we must really make ourselves more worthy of the image we are trying to sell.

There's an evangelistic campaign for you to get enthused about.

To get anywhere we need to do what Frank Bain says we don't do, and a lot more.

And we need to jack up the law schools and bar examiners, and stir things up generally. For one example, one reason the public has a low opinion of us is that most of us deserve no more. It's pure folly to keep our heads in the sand while insisting—to the public and to ourselves as well—that anyone admitted to the Bar is competent to handle every kind of law work. That is silly.

How much better we would stand in the eyes of the public if we, as a profession—could say out loud: Lawyer A is a corporate law specialist; Lawyer B is a negligence trial lawyer; and so on. Sure it would hurt a lot of us; we would have to pick a subject and learn it.

I could write for pages but I am sure you get the idea.

As to recognizing specialities, two thoughts:

To make money we have to give good service, and to give good service lawyers have to specialize. That is true of every firm in the country that is doing any good; and the more specialization the better they do. But the great majority of our lawyers, maybe 75 per cent, in one-, two- and three-man offices, haven't gotten the message that doctors are taught in medical school: specialize or starve.

Second, about ten years ago some of us stirred up quite a fuss on specialization. Who stopped us cold? We weren't stopped by solo practitioners or small-firm lawyers, not at all.

The lesson of history is evolve into something better, or your species ceases to exist. And economically the lawyers are dropping down and down, in comparison with the rest of the country. We better face it, quit worrying about Shakespeare and international relations and improving the world by oratory, and do something about ourselves. Only from a strong, solid base can we really influence others, either in our own country or abroad.

ARCH M. CANTRALL
Clarksburg, West Virginia

John Birch Society Essay Contest

I should like to make a comment concerning the recent article in *The New York Times* regarding the $2,300 essay contest to be conducted by the John Birch Society on "grounds for impeachment" of Chief Justice Earl Warren.

I seriously question the right of this "right", which obviously casts a reflection upon the honor and prestige of a leading member of our profession. In my opinion the charge of impeachment is a serious threat which leaves an aftermath not generally desired by any lawyer, let alone one on the bench of the Supreme Court of the United States. The inference raised by suggesting such an essay is to degrade and impair the respect of the public for the highest court of the land.

It is also submitted that assuming Robert Welch had any valid reason to

(Continued on page 1060)

(Continued from page 1055)

advocate the impeachment to the general public, it could be founded only on some act of moral turpitude or some physical or mental incapacity.

I submit finally that the proponents of this charge are within their rights to disagree on any *decisions* rendered by the Supreme Court. However, it is a different matter to incite criticism or scorn upon any member of the Supreme Court by suggesting impeachment solely because of disagreement on decisions rendered by a duly constituted and competent court. In my opinion this is clearly contempt of court.

I should like to see comments on this matter from other members of our profession.

JOHN R. VALERI
Silver Spring, Maryland

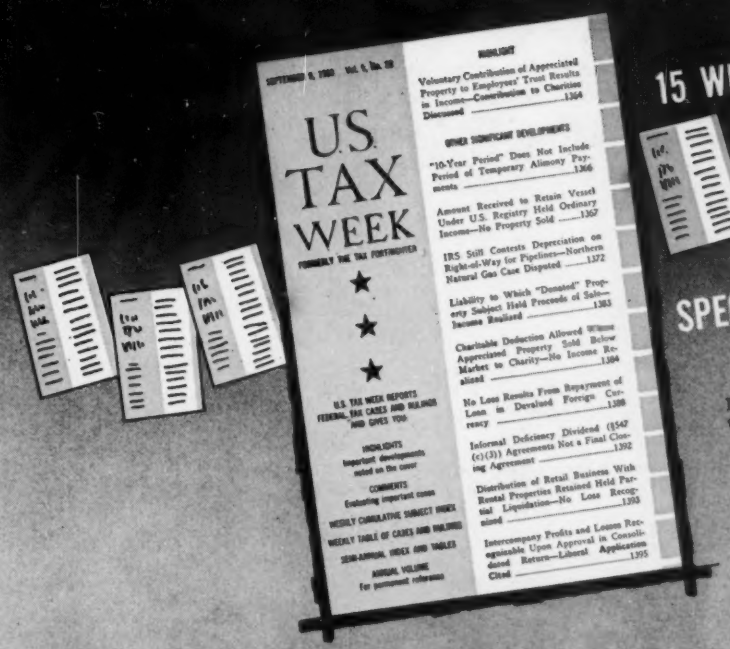
A Student Could "Hang Out His Shingle"

I read Robert Coulson's article: "A Modest Proposal to Law Schools", August issue, with great interest. He jumped directly overboard, but perhaps in the right direction with his so-called "conflict method" of law school instruction. He would "repeal" the case method and outlaw lectures. Too much time spent in listening and reading, not enough action, he says. Mr. Coulson's "law firm" idea is excellent, yet at the same time his law school law firm would operate, I am afraid, without the "dynamic tension" he hopes it would generate. Mr. Coulson would allow "make-believe" to creep into his trials, the very thing he hopes to eliminate.

An amendment is therefore offered to the "conflict method". During the freshman year, acquaint the student with the cases and statutes by means of the lecture method. All real lawyers have to read and oftentimes the ability to listen is of great value. If qualified, at the beginning of the second year, license the student to "hang out his shingle" properly issued, sealed and embossed by the dean himself.

Thereafter and in due course appoint

(Continued on page 1064)



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Closing the Gap!

MOST OF US have some form of planned retirement should we "live too long."

AND THERE is life insurance should we "die too soon."

BUT A GAP REMAINS in the curtain of family protection for the majority of us — it is the void that exists if a prolonged disability due to illness or injury should cut off our income and place our domestic economy in jeopardy. This gap — the dread of having to face months and years without income — can now be closed for you by your participation in the

ENDOWMENT GROUP DISABILITY INCOME PROGRAM

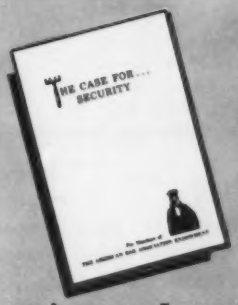
Full details of the Endowment Group Disability Income Plan are contained in the brochure *"The Case for Security"* which has already been mailed to all members.

If you have not yet received the brochure, it will arrive soon. Please be on the look out for it. If you need extra copies, mail your request to the American Bar Association Endowment, 1155 East Sixtieth Street, Chicago 37, Illinois.

After more than a year of research and study by the Board of Directors and a special Insurance Committee appointed by the Endowment, this Group Disability Income program is announced with the confident expectation that its excellence will be recognized by a high degree of participation among members throughout the country.

If this program is as successful as is anticipated it will provide the Endowment with a source of funds in the form of experience credits, comparable to the dividends being received from the Group Life Insurance program. This will enable the Endowment to expand its work in carrying out its charter purposes.

The monthly benefits range from $200 to $600 and premiums may be payable semi-annually. There is a choice of "waiting" periods—*one month or one year*—and enrollment is invited from every member under age 60 at entry.



This new Endowment insurance program is underwritten by the Continental Casualty Company of Chicago, Illinois.

Even if you already have some Income Insurance through your local Bar Association, you are probably still below the level of your desired income replacement requirements. Once you are enrolled in this program, the benefits are payable in addition to any other insurance you may carry.

And if you do *not* participate in any such local plan, even a brief glance at "The Case for Security" will convince you that the Endowment program can best meet your needs—simply and inexpensively.

AMERICAN BAR abae ASSOCIATION ENDOWMENT

(Continued from page 1060)

three jury commissioners from the student body who must by a day certain under penalty subpoena grand juries from among the retired citizens of the township, male and female. The licensee will then contact his proctor for a plaintiff, a Mr. Jones who, in the exercise of due care, did sustain great and painful injuries, etc.—to his great damage, etc. There is real blood in this case. The proctor will lay the true facts of the untried case before his protege, together with such real evidence as has been accumulated. The student-lawyer must now prepare for trial, a real one. If he loses, no fee, and he may not have a proctor next year.

To the young who aspire to be lawyers, this means hard work, research, case study, statutes, amendments, instructions, interviews, midnight oil, after office hours, no dates for the time being please. If the student has time he will slip into a freshman lecture wherein Professor Blank will go, rather deeply, into *res ipsa loquitur*. Will he listen or will he dream?

ALONZO D. CAMP
Little Rock, Arkansas

Bully Barrister v. Booky Academician

It is a shame that Mr. Coulson's article, "The Conflict Method: A Modest Proposal to Law Schools", could not have been printed on the back cover of the August issue. There it could have been appropriately illustrated with cartoon panels showing Bully Barrister drubbing Booky Academician. The inarticulate slob could

(Continued on page 1066)

(Continued from page 1064)

then have taken Mr. Coulson's course in the Conflict Method (with "Dynamic Mental Tension"), and then come back to stomp his tormentor and win a prime job on Wall Street.

Appealing though this picture may be, I would like to say a word for the Case Method as I believe that it has more to recommend it than the fact that it was first used 90 years ago at Harvard. At the outset Mr. Coulson assumes that the Case Method lecture is necessarily a form of bookish boredom, when he states:

> At Harvard Law School, for instance, many lectures seat more than one hundred students. The students listen and record the comments of the lecturer concerning a series of assigned cases in the particular field. They have often read these cases in advance. It is a fact that a student seldom recites or contributes to the exploration.

He may be making a correct statement as to the state of affairs at Harvard Law School. However, he is not making a correct statement as to the way the Case Method is administered at the Law School of the University of Texas, and I suspect that it is not the way the Case Method is administered in many other institutions. . . . I have seen classes of more than one hundred gripped with an interest not unlike fear knowing that they were secure only in the knowledge that if they had not read the cases for the day they stood a good chance of being sent from the room. Like carrying a cat home by the tail, such an experience leaves a lasting impression that does not fade with time.

I will grant that moot courts, law review work, practice courts, legal aid, office practice courses, and perhaps even Mr. Coulson's "law firms" have their place in a well run law school. However, I am convinced that to scrap the one method which has been demonstrated to be flexible enough to come even close to meeting the almost hopeless task of equipping a person through formal education to practice law would be but a long step in the wrong direction. It would be my suggestion that before brave law teachers "snatch up the banner and charge wildly forward", they stop to reflect on whether they are making the best use of the present method of instruction.

THOMAS R. SCOTT

Fort Stockton, Texas

Parliamentary Road to Socialism

Bit by bit, say the Russians, capitalism will be legislated away. This is the parliamentary road to socialism. As seen from here, transferring 70 per cent of our patent system from business to government and creating a new bureau to administer government owned patent rights ("A Government Patent Policy To Serve the Public Interest" published in the July issue of the *Journal)* is an exercise, par excellence, in parliamentary socialism.

RICHARD SPENCER

Paris, France

The Federal Register System: What To Expect and How To Find It

In 1936, Judge Harold M. Stephens remarked that it was idle to know what the law is without knowing what the regulations are. Mr. Eberhart's article, as the title indicates, is a guide to the use of the Federal Register system—a system, he says, that looks much more complex than it really is.

by David C. Eberhart • ***of the District of Columbia Bar***

IN 1960, THE *Federal Register* entered its twenty-fifth year of publication under the Federal Register Act (44 U.S.C. 301-314) and its fifteenth year under the Administrative Procedure Act (5 U.S.C. 1001-1011).

Like all living organisms, the Federal Register system is constantly changing. It should, therefore, be revisited periodically, if only to see whether the changes are good, bad, or just more of the same old thing.

On this visit, it is proposed to define the system as it stands today, point out some trends, and at the same time deal with the practical problem: How do you find what you want?

In its usual sense, the term "Federal Register system" means (1) the *Code of Federal Regulations*, (2) the daily *Federal Register*, and (3) the *U. S. Government Organization Manual*. In its broadest sense, the term may also include (4) the new series of bound volumes entitled *Public Papers of the Presidents*, (5) the current slip laws, and (6) the *U. S. Statutes at Large*. These six publications have several things in common. Under law, they are all edited by the Office of the Federal Register[1] and printed by the Government Printing Office. Copies are provided for official use and for sale to the public by the Superintendent of Documents.

These publications are related in other ways. An explanation of this relationship will serve also as a brief description of these publications and of what you may expect to find in each one.

Every lawyer who practices before federal administrative bodies knows that the public rules promulgated by such bodies stem from legislation. He also knows how greatly these stems have proliferated during recent decades. Let us start then with federal legislation.

Slip Laws and U. S. Statutes at Large

The acts of Congress, as they are approved by the President or passed over his veto, are first printed on an overnight basis. These interim prints are the "slip laws". The text of the slip laws is photographically identical with the original parchment deposited with the National Archives. The headings and marginal notes are added by the *Federal Register* editors. Because the process is now photographic, the editors are able to insert lines showing the permanent pagination of the forthcoming volume of the *U. S. Statutes at Large*.

Other innovations include a new system of numbering the laws and an added means of announcing the passage of laws during the rush at the end of each session of Congress.

Starting with the 85th Congress (1957) each bill or joint resolution, as it becomes law, is assigned a number that includes the number of the enacting Congress. Thus, the first act of the 85th Congress that became law and was classified as "public", was numbered "Public Law 85-1". The second was numbered "Public Law 85-2", and so on. The same system is applied to the Private Laws—the first private law of the 85th Congress being numbered "Private Law 85-1". This system makes each law number unique and its source clear, thereby simplifying citations and making possible improved numerical finding aids.

After the adjournment of the Congress *sine die*, issuance of the *Congressional Record* is suspended until the final issue covering the session can be prepared. During this interim the President usually has many acts before him for consideration. Public acts approved during this period are listed in the current daily issues of the *Federal Register* under the heading "Title 2—The Congress".

At the end of each session of Congress, the slip laws are permanently published in the *U. S. Statutes at Large*, together with reorganization plans (if any), proposed or ratified constitutional amendments (if any), concurrent resolutions, and Presidential proclamations in the numbered

1. The office of the Federal Register is a component of the National Archives and Records Service, General Services Administration.

series. Again the text of the laws is photographically identical with the original parchment. Under 1 U.S.C. 112, this publication is legal evidence of the text in all American courts.

In 1956 a new research tool was added to the *U. S. Statutes at Large*. This consists of nineteen tables carried under the heading "Laws Affected in Volume —" immediately preceding the subject index. These tables enable the user to determine quickly whether the prior law in his hand was directly affected or even referred to by the contents of the Statutes volume. This year the first compilation of these lists will be prepared as a separate book. Covering Volumes 70 through 74 of the *U. S. Statutes at Large*, it will follow Volume 74 off the presses.

The Code of Federal Regulations

It is generally not difficult to run down a given statutory provision. Frequently, however, this is just the beginning of a more complex search. Judge Stephens had this in mind while defending the nascent *Federal Register* back in 1936. Testifying before the House Judiciary Committee, he said, "It is idle to attempt to know what the law is today without knowing what the regulations are."[2]

Today no lawyer questions the truth of that statement. Today the question is "How do I go, quickly and surely, from the federal statutes to the regulations?" The answer, in virtually every case, may be found in Title 2 of the *Code of Federal Regulations*. Chapter I of Title 2 is headed "Parallel Tables of Statutory Authorities and Rules".

Why these tables are not more widely known is one of the minor mysteries of our profession.

These tables, incidentally, are the key to the basic coverage of the Code of Federal Regulations.

The left hand column of the parallel tables consists of citations to statutory provisions as codified in the U. S. Code. To qualify for the U.S.C. a statute must have three attributes—it must be general, permanent and in force. So also with the regulations in the right hand column to which these statutes lead. To qualify for the *Code of Federal Regulations* a regulation also must be general, permanent and in force. That, basically, is the coverage of CFR.

This description of CFR coverage is of course oversimplified.[3] Yet the core of meaning of each element is generally understood, just as the core of meaning of "rule", and its synonym "regulation", is generally understood. Trouble in applying this definition arises only along the borderline. Even there any difficulty is generally a matter of concept rather than connotation.

It is beyond the scope of this article to reflect various conceptions of what the CFR ought to cover. The purpose here is to describe briefly what CFR does in fact cover, and add a few observations as to significant trends. In this latter connection a few moments may be fruitfully spent along the borderline.

As indicated above, you may expect to find in the CFR all regulations that are "general, permanent and in force" and that plainly come within the core of meaning ascribed to that phrase. These, of course, include rules of practice and procedure as well as substantive rules. You will also find a few "dividends". In recent years, and increasingly during the past year, there has been a discernible trend toward codifying materials formerly regarded as "borderline". At least they were so regarded as long as they retained such labels as "delegation of authority", "instruction", "statement of policy", "interpretation", or the like.

With due regard to the fact that reliance on nomenclature is risky in this field, this trend may be taken to mean that many agencies are assuming a more liberal attitude toward formalizing matters that were hitherto kept in a less binding guise.

This trend is deliberately encouraged by the regulations of the Administrative Committee of the *Federal Register* (24 F.R. 2343; 1 CFR Ch. I). Section 13.2, covering the codification of organizational materials submitted under Section 3(a)(1) of the Administrative Procedure Act, is designed to encourage inclusion in CFR of all general and permanent delegations of final authority.[4]

Section 13.23 of the Committee's regulations is designed to encourage inclusion in CFR of general and permanent "statements of policy and interpretations" issued under Section 3(a)(3) of the Administrative Procedure Act.[5]

The matter of "instructions" is perhaps more meaningful. Aside from instructions accompanying forms, most officials think of "instructions" as something less than regulations—less formal, less general, and less binding. Ordinarily, such instructions are directed to officials and employees rather than to the public. Their effect on the public may range from very remote to almost direct. The latter type has been included in the trend toward formalization and codification. Some of the examples noted below further illustrate the risks of relying on mere nomenclature in attempting to measure trends along the borderline of regulatory activity.[6]

Daily Federal Register

Except for a few hoary passages (see 33 CFR 203.5, for example), the text of the CFR is lifted from the pages of the daily *Federal Register*. CFR trends are therefore also daily *Register* trends. However, the daily *Register* covers a far broader field than the CFR. The text of the daily *Register* is arranged under four principal headings: (1) Presidential Documents, (2) Rules and Regulations, (3) Proposed Rule Making, and (4) Notices.

Under the first three headings are carried daily amendments and proposed amendments keyed to CFR, hence the scope is essentially the same as CFR. It is under the heading "Notices" that the daily *Register* goes off on a frolic and detour all its own.

The "Notices" section of the *Federal Register* is essentially a catch-all for

2. Harold M. Stephens, then Chief Justice, U. S. Court of Appeals for the District of Columbia. CONGRESSIONAL RECORD, March 17, 1936, page 3884.

3. See definition of "Document having general applicability and legal effect" and "Document subject to codification" at 24 F.R. 2354; 1 CFR 40.10, 40.11.

4. For examples see 6 CFR Part 300; 38 CFR Part 2; 41 CFR Part 3-75.

5. For examples of policy see 9 CFR Part 203; for mixed policy and interpretation see 7 CFR 81.400, 81.401, and 29 CFR Parts 451, 452, 453; for interpretations see 12 CFR Part 7; for typical admixture of policy, interpretation, substance, and procedure see 33 CFR Ch. 1 (noting authority citations).

6. For examples of "instructions" see 7 CFR 301.38-5a, 301.45a, etc.; 38 CFR 1.985; 32 CFR Part 1001 *et seq.*; 41 CFR Subtitle A.

materials that do not qualify as (1) "Presidential documents", (2) "documents subject to codification", or (3) "Notice of proposed rule making" contemplated by Section 4(a) of the Administrative Procedure Act. This important hodge-podge includes descriptions of agency organization, notices of various hearings, other notices concerned with licensing and with quasi-adjudicative actions, entry or withdrawal of public lands, declarations of disaster areas, vesting orders, voluntary agreements and programs and countless other matters of direct public interest within the jurisdiction of the executive agencies.

Aside from the Federal Register Act and the Administrative Procedure Act, there are about one hundred separate acts requiring that specific matters be published in the *Federal Register*.[7] Documents carrying out these specific requirements generally fall into the "Notices" section of the daily *Register*. Here they may be run down by use of daily, monthly, quarterly, and annual subject indexes.

Proposed rule making, as such, is published only in the daily *Federal Register*. A very significant trend is readily discernible in this area. Section 4(a) of the Administrative Procedure Act became effective on September 11, 1946. During the calendar year 1947, about six hundred documents were concerned with proposed rule making. Ten years later (1957) this had risen to about 980 documents per year. In 1959 this figure leaped to over 1,300. Yet the average of all documents published remained fairly constant at about 11,500 in normal years during this period.

The meaning of this trend seems fairly clear. More and more agencies, with the Department of the Interior in the van, are voluntarily inviting the public to participate in rule making. They are doing this in fields that are technically exempt from the requirements of Section 4(a) and in cases where it would be plausible to except a given action from the requirements of that section.

U. S. Government Organization Manual

This annual handbook is designed primarily to present compactly the descriptions of organization required to be published in the daily *Federal Register* under Section 3(a)(1) of the Administrative Procedure Act. In addition it contains parts on the legislative and judicial branches. Many pages are devoted to important supplemental information, including (1) descriptions of quasi-official organizations and selected international organizations, (2) charts of the more complex agencies, and (3) appendixes relating to abolished or transferred agencies, and to government publications.

The book closes with a list of names and a very usable subject index. The list of names is incidentally a sort of informal and current "Who's Who" of federal officialdom.

Public Papers of the Presidents

These handsome annual volumes are the latest addition to the *Federal Register* family. The text is based on presidential materials released by the White House during the calendar year, including press conferences verbatim. Items are presented in chronological order rather than by class. Most needs for a classified arrangement are met by the subject index. For example, a reader interested in veto messages sent to Congress during a given year will find them listed in the index under "veto messages".

Volumes covering the calendar years 1953 through 1960 are now available. Present plans are to carry the series forward, year by year, and to back track until contact is made with the Franklin D. Roosevelt series edited by Judge Samuel I. Rosenman.

Indexes and Finding Aids

In capsule, here are some "inside tips" on effective use of subject indexes and numerical finding aids in the *Federal Register* system.

Subject indexes are familiar to most people and hence are the target of much criticism. No analytical subject index is completely satisfactory. The indexes to the *U. S. Statutes at Large*, the *U. S. Government Organization Manual*, and the *Public Papers of the Presidents*, are fairly standard. The indexes to the daily *Federal Register* and the *Code of Federal Regulations* are necessarily subject to some specialization.

In order to keep these last two within reasonable bounds, it is necessary to place most of the analytical entries under the aegis of the issuing agency. The only alternative is a much longer index taking much longer to compile. There are valid objections to undue length and to any delay. The end result is a compromise that, quite coincidentally, aids the expert and frustrates the novice. A beginner in the field of Federal Rules may be well advised to consult the *U. S. Government Organization Manual* and the table of CFR titles and chapters before exploring an annual index to the daily *Register* or the general index to the CFR. A little time devoted to understanding the system may save much aimless effort productive of dubious results.

David C. Eberhart was born in Pennsylvania and educated in Virginia and the District of Columbia. He received his A.B. from Washington and Lee University and his LL.B. from Georgetown. He served as Headmaster of the Norfolk Academy before coming to Washington in 1937 to work for the newly established *Federal Register*. He was appointed Director of the Federal Register in 1958.

7. Citations to these requirements may be obtained from the office of the Federal Register, Washington 25, D. C.

Numerical finding aids are the expert's keenest research tools. The legal profession has taken them more and more to its heart.

Since no sound lawyer would use a complex numerical finding aid without first reading the explanation that goes with it, the following table should prove useful.

The finding aids tabulated below only look formidable. They were designed for everyday use and need not frighten anybody. It is impracticable to concoct a comprehensive example involving the use of all aids. A simpler example will serve to break the ice.

Assume that today is April 30, 1960. You have before you Chapter 13 of the Atomic Energy Act of 1954 as published at 42 U.S.C. 2181-2190 (1958 Edition). You have a client whose case involves Section 156 and the related regulations. A glance at the tables of laws affected in 73 Stat. (Item 1, above) shows that the act was amended in 1959 by Public Law 86-50. You get this amendment.

Section 156 of the act (42 U.S.C. 2186) provides in part "The Commission shall establish standard specifications upon which it may grant a patent license. . . ." These specifications are at the crux of your client's problem. You turn to the parallel tables of statutory authorities and rules (Item 2, above). Running down the left column under Title 42, you quickly reach a reference "2181 through 2190". These numbers include your section 2186.[8] A glance at the right column leads you to 10 CFR Part 80. Continuing down the left column you reach the reference "2186". Here the right column shows "10 CFR Part 2, Part 81". Your key number 2186 has led you in a matter of seconds to all of the procedural and substantive regulations directly relating to the standard specifications for granting a patent license under the Atomic Energy Act of 1954.

In Part 2 you find the "Rules of Practice," including in Subpart G "Rules of General Applicability". In Part 80 you find more specific procedures. In Part 81 you find the substantive provisions that started your search, *i.e.*, the standard specifications for the granting of patent licenses. You want to know what these specifications are today (April 30, 1960).

A quick check of the pocket supplement shows that no amendments to Part 81 were issued during 1959. But what about during 1960?

Going to the 1960 file of the daily *Federal Register*, you check the Codification Guides (Item 5, above). A glance at the cumulative guide for the first quarter, assures you that nothing happened during January-March. A similar glance at the cumulative guide in the issue of April 29 assures you that there were no amendments to date during April. While looking at these codification guides, you incidentally

Table of Numerical Finding Aids

Identification	*Publication*
1. Tables of laws and other federal instruments cited in or affected by text of *U. S. Statutes at Large*.	Started with 70 Stat. as separate pamphlet; in 71 Stat. *et. seq.*, follows text, or text of Part 1 if volume is partitioned.
2. Parallel Tables of Statutory Authorities and Rules (leading from U.S.C. to CFR).	In 2 CFR, and with the monthly, quarterly, and annual codification guides in F.R.
3. Table of statutes cited as authority for Presidential documents.	In annual, non-cumulative supplements to 3 CFR (as Table 5).
4. Table of statutes cited or construed by Bureau of Land Management regulations.	In 43 CFR, Appendix A and pocket supplements thereto.
5. Codification Guides (listing current changes in CFR).	In F.R. daily, cumulated daily within the month; cumulated monthly, quarterly, and annually.
6. Lists of CFR sections affected by documents published in F.R. since January 1, 1949.	At end of revised CFR volumes and in pocket supplements to all volumes.
7. Tables of Presidential documents cited or included in CFR.	In 3 CFR (basic volume) and cumulative pocket supplements thereto.
8. Annual lists of Presidential documents, published in F.R.	In annual, non-cumulative supplements to 3 CFR; and in the 5-year compilations thereof (as Tables 1, 2, and 3); also in *Public Papers of the Presidents* (Appendix B).
9. Annual checklist of Presidential documents affected by published documents (See item 1 for effect of statutes).	In annual, non-cumulative supplements to 3 CFR (as Table 4), and in 5-year compilations thereof (as Table 7).
10. List of Public Land Orders.	In 43 CFR, Appendix B and pocket supplements thereto.
11. List of Canal Zone Orders.	In 35 CFR, Appendix, and pocket supplements thereto.
12. Guide to Record Retention Requirements (Imposed by law or regulation).	In 1 CFR Appendix A; revised each spring in F.R.

8. It is important to note this technique in any numerical finding aid. *Caveat:* watch for your number *between* inclusive numbers as well as watching for it standing alone.

note that no new rules have been proposed in your area of interest.

You are satisfied that you have the rules in Part 81 as they are in force at that moment. Furthermore, what you have is presumptively valid and accurate and is required to be judicially noticed (44 U.S.C. 307, 311).

You are momentarily upset when your client finally reveals that the facts in his case arose on February 1, 1958, and hence are governed by the regulations in effect on that date (For the sake of brevity, we again confine this search to Part 81).

Going back to your CFR volume, you note the citation of source following the table of contents to 10 CFR Part 81. This citation plainly indicates that the text originated on January 27, 1956 *except as otherwise noted*. The only exception is noted in brackets following §81.3. This note cites an amendment made at 23 F.R. 1122, February 21, 1958. Consider the effect of this amendment, and you have the regulations in force on February 1, 1958.

As a safety measure you check out the list of sections affected, published at the end of your CFR volume (Item 6, above). This check only takes a few seconds, but it assures you that §81.3 carries the only amendment. It also pays a dividend by revealing the publication of the proposed Part 81 on April 8, 1955 at 20 F.R. 2283. It often helps to know such "legislative history".

If you handle the rest of the case as efficiently as you handled this search, your client is to be congratulated on his choice of counsel. Good luck to you at the hearing.

Professor Samuel Williston Celebrates His 100th Birthday

On September 24, 1961, the revered Professor Williston achieved the second ambition of his life by surpassing the century mark! Charles C. Burlingham had set the pace. And running strongly not far behind is Dean Roscoe Pound whose 90th birthday had the date line of October 27, 1960.

Professor Williston's first ambition was to be a great teacher of law and that he achieved with ease. Professor Edmund M. Morgan has stated that the case method in Williston's hands was the most perfect educational method ever devised.

The students for many generations agreed, but added, "He was the gentlest teacher ever to impale a student on the horns of a dilemma."

Professor Williston's outstanding achievements as teacher, scholar and writer in the field of law are so universally known and acknowledged that they need no repetition.

On the occasion of his 100th birthday the Law School Faculty and the Harvard Law School Association presented a plaque to Samuel Williston "who through his life and teaching has shown us the way to wisdom".

It has become a legend that when time for retirement comes, Harvard University writes the Professor that his resignation is accepted with regret. To this it is reported Professor Williston replied, "You cannot accept an offer which has never been tendered." In his autobiography, *Life and Law*, it is recorded that he was seriously upset by the suggestion of his retirement.

For the Law School Tarbell did a splendid oil portrait of Professor Williston whom he found to be a difficult subject because "he has a quizzical twist of his lips which is as hard to reproduce as sunlight dancing on water". The good Professor's desk and chair were moved into Tarbell's studio. There were sixty sittings. There is here reproduced a competent artist's oil copy of the Tarbell portrait.

The American Bar Association Medal for "conspicuous service to the cause of American jurisprudence" was first awarded in 1929. It was presented to Samuel Williston.

REGINALD HEBER SMITH

Boston, Massachusetts

Mergers and the Law: New Directions for the Sixties

Corporate mergers have a magnetic fascination for the Federal Trade Commission and the Justice Department. Mr. Rowe examines the present development of the law, noting that many important questions are yet open, and urges competition-oriented use of the antitrust laws.

by Frederick M. Rowe • *of the District of Columbia Bar*

IN VIEW OF THE stormy antitrust forecasts for the sixties, businessmen may deem it some comfort that, to date at least, no jail sentences have been proposed for violations of the anti-merger law, and that only their companies, not they personally, will be dismembered if the Government brings a successful divestiture suit.

Corporate mergers have had a magnetic appeal not only to the trustbusters, but also to the punsters of our times. *Fortune* magazine has written up the "urge to merge"; legal scholars have dissected the "anatomy of a merger"; and to the Justice Department's prosecutors, "merger will out".

But more important from the viewpoint of business firms, corporate acquisitions occupy an increasingly prominent role in over-all government policies for a competitive era. Two government agencies, the Federal Trade Commission and the Antitrust Division of the Department of Justice, compete vigorously in anti-merger enforcement under the Clayton Act. This is in addition to the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Power Commission, and other regulatory agencies, which may scrutinize corporate combinations in light of special government policies for a particular regulated industry. Furthermore, private parties also may invoke the Clayton Act, typically to resist takeovers by other corporations.[1]

Along the New Frontier in Washington, corporate mergers are already caught up in the early shooting. Attorney General Kennedy's maiden address, before the American Society of Newspaper Editors on April 21, 1961, declared that "Our aim in enforcing the anti-merger law is to make sure that no enterprise has a chance to dominate or control an industry *or to start in that direction*".[2] At the April hearings of the Celler Committee on mandatory pre-merger notification bills, Chairman Celler's opening statement noted a "rapid acceleration in the merger movement" and warned that "the basic objectives of the antitrust laws have been frustrated in considerable part by mergers and acquisitions which have resulted in giant aggregations that have obtained economic power to control price and supply".[3] The new chiefs of the FTC and the Antitrust Division embraced these sentiments and supported a compulsory sixty-day pre-merger notification and waiting period, while the FTC requested novel injunctive powers permitting the agency itself to halt impending mergers *prior to* court hearings on their legality.[4]

With a bold new Administration in the saddle and after one decade of experience under the 1950 Celler-Kefauver amendments of the Clayton Act, the time is appropriate for some assessment of where merger policy stands today, and the direction it may take in the years ahead.

Anti-Merger Enforcement During the Past Decade

How can we summarize the past decade of anti-merger enforcement?

There have been numerous blast-offs by the FTC and the Antitrust Division, but most of their shots are still in orbit—and we are waiting to see when and where they will come down in the courts, and what can be learned from their explorations.

Since 1951 ninety-three complaints challenging mergers have been filed by

Note: This article is based on a paper delivered before the Fourth Economic Conference of the National Industrial Conference Board May 18, 1961.

1. *E.g., Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich 1960), *affirmed*, 280 F. 2d 747 (6th Cir. 1960); *American Crystal Sugar Co.* v. *The Cuban American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1958); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953) *affirmed*, 206 F. 2d 738 (2d Cir. 1953).

2. CCH Trade Reg. Rep. No. 182, April 28, 1961, page 2 (emphasis added).

3. Opening Statement of the Chairman at Antitrust Subcommittee Hearings on Premerger Notification Bills, April 27, 1961, pages 2, 3. See also Statement of Representative Wright Patman, on the same occasion, that "mergers are continuing at an alarming rate, and are transforming dramatically the market structure of entire industries".

4. Statement before the Celler Committee by FTC Chairman Paul Rand Dixon, April 28, 1961, pages 7-8, advising that the Commission, rather than supporting legislative proposals permitting it to seek preliminary injunctions in the United States district courts, "now believes that a more appropriate procedure would be to amend Section 11 of the Clayton Act, which is the section granting enforcement powers, and to give the Commission the direct authority, subject to court review, to issue temporary injunctions and restraining orders. . . . The Commission favors preliminary injunction powers not only for merger cases, but for all instances in which it issues cease and desist orders".

the enforcement agencies—forty-nine by the Antitrust Division and forty-four by the FTC.[5] Of these, twenty have been settled without trial, typically by some voluntary divestment or abandonment of a proposed acquisition, in whole or in part.[6] Of the remaining seventy-three cases, the Government secured final victories in two (most prominently, the *Bethlehem-Youngstown* case),[7] the defendants decisively won the *Columbia-Screen Gems* case,[8] and the *Jerrold Electronics* decision let the company keep its past acquisitions, but enjoined further acquisitions for three years.[9] (Incidentally, the FTC which sits as a trial court hearing its own complaints, has to date ruled in its own favor in all seven cases up for final decision, but five of its orders are still under review by the courts and one was recently set aside.)[10]

In sum, compared with only five finally litigated judgments, more than sixty merger proceedings today are in various stages of trial or appellate review—including the important *Brown Shoe* case, up for Supreme Court review of a Government victory, and the *Continental Can/Hazel-Atlas* merger, where a district judge recently indicated he would dismiss the Justice Department's complaint.[11]

It is manifest, therefore, that the merger law is far from jelled. The last word remains to be spoken by the courts.

Key Questions Involved in Pending Cases

Some of the key legal question marks awaiting answers in pending cases are:

(1) The status of acquisitions for diversification, where an established company acquires a producer in another field (*e.g.*, the General Motors acquisition of the Euclid Road Machinery Company, or Procter & Gamble's purchase of the Clorox bleach company);[12]

(2) The limitations on a series of acquisitions in separate geographic markets (*e.g.*, the cumulative acquisitions of local enterprises by Foremost Dairies, Kroger, or Continental Baking Company);[13]

(3) The reconciliation of the Justice Department's program with the policies of other regulatory agencies in the merger field (*e.g.*, the El Paso Natural Gas pipeline case, where the FPC approved an acquisition attacked by the Antitrust Division;[14] or the Antitrust Division suit against a Milwaukee bank merger approved by the Federal Reserve Board);[15]

(4) The extent to which the FTC can avoid the legal standards of the Clayton Act by attacking acquisitions as an "unfair method of competition" under the Federal Trade Commission Act (*e.g.*, the *Foremost Dairies* case, where the Commission challenged some acquisitions of intrastate enterprises and partnerships exempt under the Clayton Act).[16]

Some Lessons Available from Enforcement Record

Nevertheless, *some* lessons appear from the enforcement record to date: Merger cases are uniquely complex

5. Over-all statistics furnished by Justice Department and FTC officials, respectively, and do *not* include events since May, 1961. (Technical dismissal of an outstanding complaint and subsequent refiling is counted as one complaint only.)

The cases *until October, 1960*, are tabulated and analyzed in Betty Bock's excellent and invaluable Conference Board Business Economics Study No. 69, MERGERS AND MARKETS, AN ECONOMIC ANALYSIS OF CASE LAW, pages 70-75 (1960).

Subsequent to the Bock study, Section 7 complaints by the Justice Department issued against: Phillips Petroleum Co. and Union Oil Co. of California (December 9, 1960); Penn-Olin Chemical Co. (January 6, 1961); General Cable Corp. (January 19, 1961); American Smelting and Refining Co. (January 19, 1961); Koppers Co., Inc. (February 17, 1961); Philadelphia Natl. Bank (February 25, 1961); Bank Stock Corp. of Milwaukee (March 2, 1961); Aluminum Co. of America (April 27, 1961); Kaiser Aluminum-Chemical Corp. (April 27, 1961) (proposed acquisition of Kawneer Co.); Kaiser Aluminum & Chemical Corp. (April 28, 1961) (acquisition of U. S. Rubber Co. Wire & Cable Department); Continental Oil Co. (May 16, 1961); and by the FTC against Leslie Salt Co. (December 14, 1960); American Marietta Co. (January 27, 1961); and Kaiser Industries Corp. (March 16, 1961, supplanting the earlier complaint against Kaiser issued June 27, 1960).

6. Justice Department cases: Minute Maid Corp. (September 7, 1955); Hilton Hotels Corp. (February 6, 1956); General Shoe Corp. (February 27, 1956); Schenley Industries (April 3, 1957); Lucky Lager Brewing Co. (October 6, 1958); Anheuser-Busch, Inc. (January 11, 1960); The Hertz Corp. (June 29, 1960); Gamble-Skogmo, Inc. (July 1, 1960); American Radiator & Standard Sanitary Corp. (September 20, 1960); Maremont Automotive Products, Inc. (December 9, 1960). See also Standard Oil Co. (Ohio) (January 22, 1960); FirstAmerica Corp. (September 30, 1960) (stipulated settlements accompanied by dismissal of the complaint, rather than judicial consent decrees).

FTC cases: Scovill Mfg. Co. (September 14, 1956); Union Bag & Paper Co. (December 10, 1956); Vendo Co. (September 6, 1957); International Paper Co. (September 25, 1957); Automatic Canteen Co. (June 23, 1958); Gulf Oil Corp. (January 5, 1960); Diamond Crystal Salt Co. (February 4, 1960).

7. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958); *Maryland & Virginia Milk Producers Ass'n.* v. *United States*, 362 U. S. 458 (1960). The 1957 *DuPont/General Motors* decision by the Supreme Court, 353 U. S. 586, concerned a suit filed in 1949, under Section 7 *prior to* its amendment in 1950 and recently culminated in a Supreme Court direction ordering divestiture by DuPont of its General Motors Stock, 29 U. S. LAW WEEK 4434 (May 22, 1961) *reversing* 177 F. Supp. 1 (N.D. Ill. 1959).

8. *United States* v. *Columbia Pictures*, 189 F. Supp. 153 (S.D. N.Y. 1960).

9. *United States* v. *Jerrold Electronics Corp.* 187 F. Supp. 545 (E.D. Pa. 1960), *affirmed per curiam*, 365 U. S. 567 (1961).

10. Orders of divestiture have been entered by the Commission in the following contested cases: Farm Journal, Inc. (July 17, 1956); Crown Zellerbach Corp. (December 6, 1957); Erie Sand & Gravel Co. (October 26, 1959); Reynolds Metals Co. (January 21, 1960); A. G. Spalding & Bros., Inc. (March 30, 1960); Scott Paper Co. (December 16, 1960); Pillsbury Mills, Inc. (December 16, 1960). In addition, the Commission sent back the Brillo case for further hearings before the Examiner (March 25, 1960).

Also, hearing examiners' decisions in contested cases have found Section 7 violations by Procter & Gamble Co. (June 17, 1960); Foremost Dairies, Inc. (December 9, 1960); Luria Bros. & Co., Inc. (March 29, 1961); and Union Carbide Corp. (February 8, 1961). (On June 15, 1961, the Commission remanded the Procter & Gamble case for further evidence.)

Currently pending judicial review proceedings contest all final FTC orders except *Farm Journal*, where the Commission's decree was largely ineffectual due to the perishable nature of the acquired asset. On May 28, 1961, the Court of Appeals for the Third Circuit set aside and remanded the Commission's *Erie Sand and Gravel* ruling, principally by reason of the FTC's faulty market analysis. On June 5, 1961, the Ninth Circuit affirmed the FTC ruling in the *Crown Zellerbach* case, which is now ripe for Supreme Court review.

11. The Supreme Court's forthcoming ruling next year in the *Brown Shoe* case, which involves a variety of legal issues, may become of utmost importance in the jurisprudence of mergers. *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959), *prob. juris noted*, 363 U. S. 825 (1960); analyzed in Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Anti-Merger Act*, 61 COLUM. L. REV. 629, 631 (1961). In the *Continental Can* case, the United States District Court in New York City stated its intention to dismiss the Justice Department's complaint, but to date has rendered no judgment and opinion. CCH Trade Reg. Rep. No. 174, page 5 (February 2, 1961). See also *U. S.* v. *Diebold, Inc.*, dismissed by the District Court on March 8, 1961, now pending on appeal before the Supreme Court.

12. See *United States* v. *General Motors Corp.*, filed October 16, 1959, pending in United States District Court in Cleveland, Ohio; Procter & Gamble Co., FTC Docket 6901. Initial Decision finding violation (June 17, 1960), remanded by the Commission on June 15, 1961, for further evidence.

13. Foremost Dairies, Inc., FTC Docket 6495, Initial Decision (December 9, 1960), now pending on review by Commission; Kroger Co., FTC Docket 7464, filed April 1, 1959, and Continental Baking Co., FTC Docket 7880, filed May 5, 1960—both pending in hearings.

14. See *California* v. *Federal Power Commission*, respondent, and El Paso Natural Gas Co., intervenor, 1961 Trade Cas., paragraph 69,967 (D.C. Cir. March 30, 1961).

15. *United States* v. *Bank Stock Corp. of Milwaukee*, filed March 2, 1961, pending in United States District Court in Milwaukee, Wisconsin. An interesting policy co-ordination aspect is posed by the Justice Department's negotiation of judicially approved consent decrees which permit the retention of acquired firms operating in separate non-competing geographic markets, even while this type of acquisition is being attacked by the FTC. Compare, *e.g.*, *United States* v. *Hertz Corp.*, 1960 Trade Cas., paragraph 69,762 (S.D. N.Y. 1960); *United States* v. *Hilton Hotels Corp.*, 1956 Trade Cas., paragraph 68,253 (N.D. Ill. 1956), with the FTC proceedings in the food industry cited at note 21 *infra*.

16. Foremost Dairies, Inc., FTC Docket 6495, Initial Decision (December 9, 1960), now pending before Commission on review of hearing examiner's decision which curtails the scope of Section 5 in merger cases. *Cf. also National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825, 837 (7th Cir. 1955), *reversed on other grounds*, 352 U. S. 419 (1957).

and protracted proceedings, which can severely tax the patience and resources of all concerned. The extreme example is the *Pillsbury* case, filed by the FTC in 1952, which is only now heading for review by the Court of Appeals of an FTC divestiture order entered last year. On the other side, the *Bethlehem-Youngstown* case, where industry statistics were readily available, was resolved within two years in the district court.

As I see it, the out-size dimensions of most merger cases are largely unavoidable, at least for now. For, so long as the contours of the law are undefined, each side tends to prove and disprove the charges along *every* possible legal approach. Also, the statutory test of legality is cast in terms of a prophesy of future competitive potentialities, which can entail massive economic proof in any dynamic industry where reliable statistics are hard to come by. Furthermore, mergers spring from a multitude of motivations which can illuminate the true nature of an acquisition to be unrelated to competitive factors—such as tax considerations, management and succession problems of the seller, or simply his desire to liquidate his business and get out. Finally, no defendant company in a merger case waltzes lightly up to the headsman's block, but will insist on a full defense.

But since the defense of a merger case is an ordeal, at best, the critical concern from a company's standpoint is whether suit is filed at all.

No Calculus of Safety, But Some Points To Watch

Here, too, there is no calculus of safety, although the complaints of the past do show some peril points:

(1) When an acquisition of a substantial competitor in the same business is made by one of the top-ranking firms, or results in a combination which achieves on the order of 15 per cent of an identifiable market—particularly in a static industry where new entry is rare.[17]

(2) When a combination joins a leading customer and a leading supplier so that other suppliers are permanently foreclosed from a substantial market, or other customers are left without an independent source of supply.[18]

(3) When the acquiring or the acquired company is the leading factor in its industry, and the other company is among the leaders in a different field.[19]

(4) When the acquisition sharply disrupts the pattern of pre-existing competition in the market where the acquired company operates.[20]

Vulnerability to attack rises with such atmospheric considerations as:

(5) the acquiring company's history of growth by acquisitions;[21]

(6) the pendency of other merger cases in the same industry;[22]

(7) the interest of a congressional committee in the troubles of smaller industry members;[23]

(8) the presence of a special angle with legal sex appeal inviting a "test case".[24]

Needless to say, there is no certainty of suit if any of these conditions are met; conversely, there is no guarantee of safety for mergers falling below the line. Nor are these factors earmarks of illegality. They are merely symp-

17. On the importance of rank, see particularly *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958) (combination between second and sixth-ranking producers would increase market share of second company from 16.3 per cent to 20.9 per cent); *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959), *prob. juris. noted*, 363 U. S. 825 (1960) (acquisition by fourth-ranking of twelfth-ranking producer would move it to third place, though increasing its market share from 5 per cent to 5½ per cent. However, vertical effects in distribution were also stressed.); Pillsbury Mills, Inc., FTC Docket 6000, pages 13, 19 (December 16, 1960) (combination between third- and fifth-ranking producers of family flour in Southeast resulted in first rank regionally, with a combined market share of only 8.31 per cent. In home mix field, however, combination of second- and fifth-ranking producers resulted in 22 per cent of national market). See also the Bock study, *supra* note 5, at 49.

For stress on market shares, see, *e.g.*, *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177, 184 (E.D. Mich. 1960), *affirmed*, 280 F. 2d 747 (6th Cir. 1960) (increase from 10 per cent to 16 per cent); *American Crystal Sugar Co.* v. *Cuban American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1959) (combination occupies 13 per cent of regional market). Compare *E. L. Bruce Co.* v. *Empire Millwork Corp.*, 164 F. Supp. 446 (S.D. N.Y. 1958) (12 per cent, but no showing of difficult entry).

On the other hand, see the Justice Department's complaint in 1960 challenging the combination of Von's Grocery Co. and Shopping Bag Food Stores, two supermarket chains ranking third and fifth but together accounting for no more than 8 per cent of the dynamic Los Angeles area grocery market; and the complaint in 1958 attacking Pabst Brewing Co.'s acquisition of Blatz, with a national rank of ninth and eighteenth, together reporting 11 per cent of beer sales in a three-state area, and 23.9 per cent in the State of Wisconsin alone. Compare the Diamond Crystal Salt Co./Jefferson Island Salt Co. merger, challenged by the FTC in 1958, involving a combined total of 8.9 per cent, 11.5 per cent and 6.9 per cent of various salt categories in the national market, but 25 per cent and 21.5 per cent in a nine-state area, when the acquiring company ranked in the top three or four producers.

18. See, *e.g.*, *United States* v. *DuPont de Nemours*, 353 U. S. 586 (1957); the Union Carbide-Visking merger, FTC Docket 6826, Initial Decision (February 8, 1961); Crown Zellerbach Corp., FTC Docket 6180 (December 6, 1957); the Kennecott Copper/Okonite Co. merger challenged by the Justice Department on June 22, 1959; and the FTC complaints in Minnesota Mining & Mfg. Co., Docket 7973 (June 24, 1960); Kaiser Steel Corp., Docket 8027 (June 27, 1960).

19. See, *e.g.*, the General Motors acquisition of the Euclid Road Machinery Co., challenged by the Department of Justice on October 16, 1959; and Procter & Gamble acquisition of the Clorox Co., FTC Docket 6901, Initial Decision (June 7, 1960); and the FTC complaint against Hooker Chemical Corp., Docket 8034 (July 8, 1960). But *cf.* recent dismissal of the "conglomerate" aspect of the Union Carbide/Visking merger, FTC Docket 6826, Initial Decision (February 8, 1961); and the District Court's announced dismissal of the Justice Department complaint challenging the Continental Can/Hazel Atlas merger.

20. *E.g.*, *United States* v. *Maryland & Virginia Milk Producers Assn.*, 362 U. S. 458 (1960); Reynolds Metal Co., FTC Docket 7009 (January 21, 1960); The Procter & Gamble Co., FTC Docket 6901, Initial Decision (June 17, 1960); complaint in Ekco Products Co., FTC Docket 8122 (September 26, 1960).

21. *E.g.*, Crown Zellerbach Corp., FTC Docket 6180 (December 6, 1957); complaints in Fruehauf Trailer Co., FTC Docket 6608 (August 17, 1956); Consolidated Foods Corp., FTC Docket 7000 (December 18, 1957); American Marietta Co., FTC Docket 8280 (January 27, 1961); Minnesota Mining & Mfg. Co., FTC Docket 7973 (June 24, 1960); Ekco Products Co., FTC Docket 8122 (September 26, 1960); Leslie Salt Co., FTC Docket 8220 (December 14, 1960).

Indeed, an entire series of FTC complaints in the dairy, grocery and baking industries is largely premised on the respondents' alleged history of growth by acquisition: Foremost Dairies, Inc., FTC Docket 6495, Initial Decision (December 9, 1960); complaints in National Dairy Products Co., FTC Docket 6651 (January 16, 1956); The Borden Co., FTC Docket 6652 (October 16, 1956); Beatrice Foods Co., FTC Docket 6653 (October 16, 1956); National Tea Co., FTC Docket 7453 (March 26, 1959); Kroger Co., FTC Docket 7464 (April 1, 1959); Continental Baking Co., FTC Docket 7880 (May 5, 1960); C...pbell Taggart Associated Bakeries, Inc., FTC Docket 7938 (June 14, 1960).

22. For example, such forensic chain reactions were apparent in the FTC's series of complaints in the dairy industry, note 21 *supra*; and the several FTC proceedings involving the paper industry: Crown Zellerbach Corp., FTC Docket 6180 (December 6, 1957); Union Bag & Paper Co., FTC Docket 6391 (May 10, 1956); Scott Paper Co., FTC Docket 6559 (December 16, 1960); International Paper Co., FTC Docket 6676 (June 25, 1957); Union Bag-Camp Paper Co., FTC Docket 7496 (June 15, 1960); Inland Container Corp., FTC Docket 7993 (June 24, 1960).

See also the Justice Department's complaints challenging the Continental Can Company's acquisition of Hazel Atlas Glass Co. (September 10, 1956), and of Robert Gair Co. (October 30, 1956), and the acquisition by Owens-Illinois Glass Co. of National Container Corp. (December 4, 1956)—as well as the Justice Department's beer merger actions, Anheuser-Busch, Inc. (October 30, 1958); Lucky Lager Brewing Co. (February 18, 1958); and Pabst Brewing Co. (October 1, 1959).

23. For example, the FTC merger complaints in the dairy, grocery and baking industries, note 21 *supra*, were preceded by hostile hearings by congressional committees.

24. *E.g.*, the Justice Department's recent Penn-Olin Chemical Co. complaint, filed January 6, 1961, testing the application of Section 7 to corporate joint ventures involving stock transfers; the Department's challenge of the acquisition by General Motors of the Euclid Road Machinery Co., filed October 16, 1959, testing the statutory impact on so-called "conglomerate" mergers; the Justice Department's Columbia Pictures/Screen Gems and Lever Bros./Monsanto Chemical complaints, testing Section 7's application to intangible assets and proprietary rights.

toms which, based on experience, warrant caution—pending further interpretations by court decisions in the future.

Directions for the Future?

What lies ahead for mergers in the sixties?

The future direction of merger enforcement, as I see it, will depend largely on the ultimate resolution of one fundamental issue: whether the law strikes at mergers which genuinely impair competition in the market, or whether it symbolizes a crusade against corporate concentration or size.

All the sound and the fury notwithstanding, no merger wave has engulfed American business. Responsible observers agree that there has been no significant increase in over-all industry concentration over the past fifty years.[25] To the extent *any* information exists comparing internal corporate growth and growth by acquisition, "the total amount of assets involved in mergers has been too small to have any large or even significant effect on the structure of business generally".[26] Above all, annual merger counts are a meaningless numbers game, for they ignore that any particular merger can improve *or* impair competition.[27]

In this regard, the enforcement agencies' statistics are revealing. Last year, the Antitrust Division made preliminary investigations of 1,250 mergers. Of these, only 146 were deemed important enough for further investigation, and only thirteen suits were filed.[28] The FTC's statistics are comparable, with 1,040 investigations producing eleven complaints.[29]

These antitrust agencies were neither asleep nor delinquent. They had apparently scraped the bottom of the merger barrel, having come up with some rather small potatoes—such as the FTC's suit challenging the acquisition of two Philadelphia concrete makers with total sales of $3,000,000 per year;[30] and the Justice Department's attack on a combination of two local supermarket chains in Los Angeles accounting for 8 per cent of the area's grocery sales.[31]

The "big" combination between competitors is rare today. We have seen nothing like the old Standard Oil or Tobacco Trusts, which combined the major producers in an industry at the turn of the century. Today's merger, by contrast, is more and more an acquisition for product or geographic diversification—a new venture stimulating new competition, rather than a combination extinguishing the old.

Legal Counsel Halts Monopolistic Mergers

With few exceptions, I believe, the potentially monopolistic merger of *this* era is stopped by legal counsel in the boardroom, not by the trustbusters in the courtroom.[32] Even the cynics will agree that corporate mergers in this day and age are not consummated in smoke-filled rooms at trade association meetings, or by "phases of the moon", but typically require stockholder approval and SEC disclosure, upon the advice of antitrust-conscious counsel. The real effectiveness of the anti-merger law is not measured by the number of corporate heads rolling, but by the evident caution of responsible corporations in merger matters once the legal guideposts appear.

But while the trust era is gone, the political melody lingers. The dynamics of competition will always hurt those who cannot or will not adapt to change. Inevitably the temptation arises to blame misfortunes on bigger rivals, and congressional committees seem ever willing to lend an ear. Although large companies may wage vigorous competition by creating and invading new markets, they remain politically vulnerable because of their size. In the personal terms of politics and in American folklore, smallness too often becomes equated with virtue and bigness with sin.

Corporate mergers are the ideal target for overzealous antitrust. When the courts are loath to divorce an established company in Sherman Act monopoly cases,[33] the anti-merger provisions of the Clayton Act can break up the corporate weddings.

And too readily, the focus of legality shifts from the impact of an acquisition on the vigor of competition—a

Ace Photo

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25. See Adelman, *The Measurement of Industrial Concentration*, 33 Rev. Econ. & Stat. 269-296 (1951); Preface by Dean Edward S. Mason to Kaysen and Turner, Antitrust Policy, page xii (Harvard, 1959); Mason, Economic Concentration and the Monopoly Problem 14 (Harvard, 1957).

These conclusions are reiterated by one of President Kennedy's policy advisers. W. W. Rostow, The Stages of Economic Growth 154 (Cambridge, 1960). Even John M. Blair, Senator Kefauver's present staff economist and the principal author of the Report of the Federal Trade Commission on the Merger Movement (1948), acknowledged later that "if the Commission had made any general statement on this point, it would probably have concluded, based on its own data, that the recent mergers have not 'substantially' increased concentration in manufacturing as a whole". Quoted by Mason, *supra*, at 28.

26. Adelman, An Economic Analysis of the Current Wave of Mergers, in American Management Association, Financial Management Series No. 114, pages 82, 87 (1957).

27. *Id* at 85. See also Kaysen and Turner, *supra*, note 25, at 128-129, and the examples in note 40 *infra*.

28. Statement of Lee Loevinger, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, on H.R. 2882 Before the House Judiciary Antitrust Subcommittee, April 27, 1961, page 2.

29. FTC Annual Report, 1960, page 32.

30. Warner Co., FTC Docket 7770 (February 4, 1960).

31. *United States* v. *Von's Grocery Co. and Shopping Bag Food Stores* (S.D., Cal., March 25, 1960).

32. As Dean Mason observes: "Countless mergers and amalgamations that might well have taken place in the absence of antitrust have been scotched in the office of corporate counsel. It is, in fact, to the advice that lawyers give their clients that the laws against monopoly must look for their chief impact." *Op. cit.* note 25, *supra*.

33. *E.g.*, *United States* v. *Timken Roller Bearing Co.*, 341 U. S. 593 (1951); *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295 (D. Mass. 1953), *affirmed per curiam*, 347 U. S. 521 (1954). *Cf. United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *affirmed per curiam*, 365 U. S. 567 (1961) (divestiture denied in Clayton and Sherman Act case). *Cf.* the Supreme Court's recent direction for divestiture in the DuPont/General Motors case under Section 7.

legitimate economic inquiry—to the business losses of particular competitors[34] or vague generalities about concentration.

It is one thing to condemn on economic grounds a combination between important rivals in a stable basic industry;[35] to outlaw an acquisition designed to rub out a troublesome competitor;[36] or to invalidate an affiliation between leading suppliers and their important customers which permanently forecloses competitors from substantial markets.[37] It is quite another story, however, to attack mergers for contributing to some ill-defined and spurious rise in "concentration"[38] or for conferring a so-called "competitive advantage".[39]

Indeed, such "protectionist" standards of legality can themselves substantially lessen competition—by preventing normal and dynamic market changes from taking place.

Mergers Must Be Judged by Competitive Standards

It is my hope for the sixties that the courts will judge with care and discernment from case to case—lest the anti-merger law's proper economic objectives of fostering competition lose out to slogans and quack cures for complex problems.

Meanwhile, we must insist that a merger is an economically neutral transaction, which may help or hurt competition depending on the market setting in which it takes place. Quite recently, Attorney General Kennedy approved a multi-million dollar merger proposal between Standard Oil of California and Standard Oil of Kentucky, concluding that "it will stimulate competition".[40] Obviously, therefore, no short-cuts nor magic formulas can supplant the essential economic judgment of whether a particular merger is beneficial or detrimental to competition.

Above all, the available evidence justifies no alarm nor panic as a substitute for a reasoned and competition-oriented economic policy by the Government toward mergers in the 1960's.

The time is not yet for an antitrust guillotine.

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34. See Professor M. A. Adelman's perceptive paper, *The Anti-Merger Act. 1950-1960*, before the American Economic Association, December 28, 1960.

35. *Cf., e.g., United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958); *American Crystal Sugar Co.* v. *Cuban American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1959).

36. *Cf. United States* v. *Maryland & Virginia Milk Producers Assn.*, 362 U. S. 458 (1960).

37. *Cf. United States* v. *DuPont de Nemours*, 353 U. S. 586 (1957); but compare *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

38. For example, where particular product marketing is of an essentially local or regional nature, as typified by the food distribution field, national "concentration" statistics are misleading and irrelevant in assessing the vigor of the pertinent market competition.

39. *Cf.* Adelman's study, note 34 *supra*, concluding that fifty-two of the first seventy-six complaints filed under amended Section 7 expressly incorporated such a "protectionist" premise.

40. Department of Justice press release, June 5, 1961. Other sizeable mergers have received informal sanction by the Justice Department in light of particular market considerations reflecting beneficial rather than detrimental competitive aspects—*e.g.*, Studebaker/Packard, Nash/Hudson, and United Press/International News Service.

ASSOCIATION CALENDAR OF MEETINGS

Annual

San Francisco, California	August 6-10, 1962
Chicago, Illinois	August 12-16, 1963
New York, New York	August 10-14, 1964

Board of Governors

Spring Meeting (Washington, D. C.)	May 21-22, 1962
Annual Meeting (San Francisco)	August 2-3, 1962

Midyear

Edgewater Beach Hotel, Chicago, Illinois	February 14-20, 1962
Administration Committee	February 14, 1962
Board of Governors	February 15-16, 1962
Board of Governors, State and Local Bar Presidents and Bar Secretaries	February 17, 1962
Group Meetings	February 14-18, 1962
House of Delegates	February 19-20, 1962
State Delegates	February 20, 1962

Regional

Birmingham, Alabama	November 9-11, 1961
Salt Lake City, Utah	May 31-June 2, 1962
Little Rock, Arkansas	November 8-10, 1962

The United Nations and the Congo

The tragic death of Dag Hammarskjold while attempting to stem a new outbreak of fighting in Katanga province, and the fresh Soviet attack on the United Nations secretariat system have again focused attention on the Congo and the year-old United Nations operation there. Here is a review of the fateful first year of Congo independence and a warning that failure of financial support may destroy the United Nations as non-support of another kind did the League of Nations.

by Edmond J. Clinton • ***of Los Angeles, California***

THE CONGO, WHICH became independent on June 30, 1960, is the most valuable piece of real estate on earth. Its soil contains diamonds, tin, copper, zinc, gold, silver, manganese, tungsten, cobalt, radium, uranium and other minerals and metals. Perhaps nowhere else in the world in recent months has such a distraught population—13,000,000 in an area one fourth the size of the United States—struggled so hard to survive or divide as a nation on ground with so much natural wealth. True, nature's generous hand spread this bounty in unequal portions between the six provinces of what is now the new Republic. But nature did not anticipate man-made provincial boundries, nor could she foresee recent events in the Congo. Neither could nature predict the extent to which Twentieth Century man's second major invention for safety, the United Nations, was to become bound up with the tribes and peoples of this tortured land.

The Republic of the Congo is only one of the seventeen new nations which emerged in a single year on a continent laboring with birth and growing pains. But because the U.N. is so deeply committed in the Congo the outcome of its operation there holds consequences of vast importance both for the Congo and the U.N. itself. The Congo is in truth testing the effectiveness, the strength and the capacity of the United Nations, as it is in reality testing the intentions and determination of its member states.

From Private Preserve, Congo Attains Independence

This great territory in the heart of Africa was in the late Nineteenth Century and the early years of the Twentieth the private estate of King Leopold II of Belgium. In 1908 control passed to the Brussels Government and Belgium's policy since then has been to dominate in order to serve. The mother country wanted no nonsense about political self-government; scattered local council elections were not held until 1957. By the time the inhabitants were permitted to cast their first ballots, the Belgian Congo appealed to tourists as an amazing example of prosperity, economic development and the virtues of paternalism. New housing units dotted the landscape, elementary schools were good and the major cities exuded a well-run atmosphere. Few indeed could foresee the coming wave of nationalism which was to sweep the continent and upset a score of independence timetables. The Belgians thus were unprepared for the Leopoldville riots of 1959 which followed the first demands for immediate independence.

In January, 1959, after the first outbreaks, Belgium revised its timetable to provide at least for gradual independence. But as demands intensified, Belgium summoned representatives from the Congo to a round-table conference in Brussels where the astonished Congolese were offered their freedom forthwith.

U.N. Forces Mobilized as Independence Dawns

Just a week after I-Day, the Congo was faced with massive economic, political and social problems. Ralph Bunche, U.N. Under-Secretary, had been discussing technical assistance with the new government on the night of July 7, 1960, when the rebellious Congo army marched into Leopoldville. The army mutinied against its Belgian officers, inter-tribal fighting broke out, and there were some attacks against Europeans, of whom there were then 118,000 (78 per cent Belgian) in the Congo. Belgium intervened with troops to keep order. Prime Minister Patrice Lumumba charged Belgian aggression and called for U.N. help.

At once U.N. Secretary-General Dag Hammarskjold went into action. The Security Council met, told Belgium to withdraw its troops and approved a United Nations force and technical aid for the Congo. The build-up of troops was rapid; within twenty-four hours U.N. forces were on their way. They were contributed by African countries mostly, with contingents from Sweden and Ireland. A dozen nations sent troops and at the time of its fullest

strength the U.N. Congo force comprised 20,000 men. Other countries furnished air-lift transportation and supplies. Twenty-nine states have participated in the Congo operation in one way or another. Compared with the U.N. Emergency Force in the Middle East, the Congo force was three times the size, and, as Mr. Hammarskjold put it, assembling it was a "far bigger and more complicated" job.

The Congo itself was bitterly divided. The main factions, each headed by a major leader, were soon evident. When Mr. Hammarskjold and Prime Minister Lumumba exchanged visits, the situation was this: Lumumba wanted a strong central government in Leopoldville; Moise Tshombe, president of secessionist Katanga province, was holding onto his own province and holding out for a loose federation of autonomous Congo states; and Congo President Joseph Kasavubu, arch-rival of Lumumba, favored the looser course.

Hammarskjold Steers Course Among Battling Rivals

During these hectic days, as on occasions since, Dag Hammarskjold was in hot water with all of these leaders because he was adamant in refusing to become a party to their internal rivalries, relying on the Security Council resolution of August 9 which stated that the U.N. force will not "in any way . . . be used to influence the outcome of any internal conflict, constitutional or otherwise". This did not satisfy Lumumba who hoped to use the U.N. to fortify his own position, to defeat Tshombe and to aid the cause of Congo centralism. The Prime Minister at the height of his agitation saw fit to declare "no confidence" in the Secretary-General, announcing that the Congo might call on other outside powers for assistance. In fact, technicians, supplies and equipment from the communist bloc did begin pouring into the country.

To complicate the situation further, the Congolese parliament was prevented from meeting, and Kasavubu and Lumumba fired each other from their jobs.

While tribal warfare, attacks on U.N. troops and anarchy all were mounting in the Congo, the deliberations of the Security Council in New York ground to a halt in paralyzing cold-war tussles between the Soviets and the United States.

And so it was that with the *Baltika*, Mr. Khrushchev and autumn came to New York, in flaming red. By the time Mr. Khrushchev arrived at U.N. headquarters, the United States (under the "Uniting for Peace" resolution) had called an emergency meeting of the General Assembly, which, acting on an African-Asian resolution, voted 70 to 0 to support Dag Hammarskjold and the Security Council on Congo policies. Thus frustrated, Mr. Khrushchev was angry when the fifteenth regular Assembly began.

Mobutu Takes Power Reins; Lumumba Arrested, Slain

A new strong-man now appeared in the Congo. Colonel (now Major General) Joseph Mobutu "took over" the Congo Government following the quarrels between the president and prime minister and set up a technical commission to operate it. Mobutu ordered the Russians and the Czechs out. They left.

Kasavubu and Lumumba sat out the next few weeks in their respective houses until Lumumba slipped away from his guard for a brief excursion around town to sample public opinion. When he returned home, he proclaimed that he would take power again and chase U.N. troops from the Congo.

As the world knows, things turned out differently for him. He was arrested, beaten and imprisoned by Mobutu's forces when he next ventured out. Later he was transferred to Katanga where he was killed under cloudy circumstances.

While the communists were leaving, some Belgians began returning to the Congo. It became obvious that Mobutu himself had difficulty in restraining his central army troops, some of whom ran wild in Leopoldville's African quarter.

Rival delegations from the Congo in New York sought official U.N. recognition; the Assembly seated the Kasavubu group. President Kasavubu, himself present, requested the U.N. Congo Conciliation Commission of eleven African states to delay its departure and visit to the Congo until he could return home, which he did presently, amidst the welcome shouts of a popular reception.

Assembly Fails Hammarskjold and a New Leader Emerges

The fifteenth Assembly, just before adjourning its first session, failed by a single vote to give Dag Hammarskjold and his policies fresh support. Mr. Hammarskjold took the position that the failure of a resolution of continuing support did not mean the same thing as the adoption of a negative resolution. He said that all previous resolutions on the Congo remained intact and that he would pursue the mandate implicit in them.

From Stanleyville in Oriental province, Antoine Gizenga, Lumumba's heir, lost no time in proclaiming himself the new head of the Congo. By late February, 1961, he and his troops held Oriental and Kivu provinces and parts of Katanga and Kasai—nearly half of the Congo. Katanga in the main was controlled by the independent Moise Tshombe with the aid of 5,000 Belgian-officered troops. Albert Kolonji, another secessionist-minded provincial leader, had charge of South Kasai, and President Kasavubu had his hands on Leopoldville and Equator provinces with 10,000 central army troops.

New storm clouds descended about the upright and steady head of the Secretary-General following Lumumba's death. Violent rioting and demonstrations broke out for a time in the Congo and around the world. Shouting "assassin", Russia charged Mr. Hammarskjold with responsibility for Lumumba's death and demanded that he be fired. This was a follow-up of Mr. Khrushchev's earlier attack on the person and office of the Secretary-General. Russia wants a three-man directorate composed of one man each from the communist bloc, the West, and the uncommitted countries. In the face of this new onslaught, Mr. Hammarskjold announced that he was launching an investigation into Lumumba's death and had no intention of resigning. "I

will stand by my post", he said; to resign under circumstances such as these would be to "throw the organization to the winds". Adlai Stevenson for the United States gave firm backing to the Secretary-General and the United Nations.

Meanwhile, the Congo Conciliation Commission found the opportunity to complete its preliminary study of the situation. It recommended a summit conference of all major Congolese leaders and suggested a federal-type government.

Kasavubu designated Joseph (a popular given name) Ileo, one of the Congo's best educated men, new Prime Minister to fill the gap left by his old enemy Lumumba. President Kennedy strongly warned Russia not to intervene.

In time, the demonstrations and rioting which had broken out after Lumumba's death subsided and passions began to cool. Nevertheless, Russia and the United Arab Republic were among the first to recognize the new Gizenga regime, and several African countries (Indonesia, Ghana, Guinea, Mali, Morocco and the U.A.R.) said they would withdraw their troops from the U.N. Congo force, which eventually reached a low of 14,000.

Council Rebuffs Soviet Move, Gives U.N. Troops Power

A dramatic and crucial meeting of the Security Council took place on Tuesday, February 21, 1961. At 4:30 A.M. the Council voted down 8 to 1 a Russian resolution demanding Mr. Hammarskjold's ouster and an end to the U.N. operation in the Congo. It then approved 9 to 0 (Russia and France abstaining) a measure sponsored by Ceylon, Liberia and the U.A.R.: (1) authorizing the U.N. force to use arms if necessary to avert civil war in the Congo, (2) calling for an immediate, impartial investigation of Lumumba's slaying in Katanga province, and (3) directing the immediate withdrawal of all Belgian military and political advisers and other foreign personnel not under U.N. command.

The U.N.'s new power to disarm them so alarmed central troops that they forced U.N. soldiers out of two important supply ports near the mouth of the Congo River (Matadi and Banana) where the U.N. had been receiving 95 per cent of its supplies. Later, U.N. units were re-admitted to these ports.

Finally, the long awaited conference between Congo leaders was convened on the island of Madagascar (now the independent Malagasy Republic). For five days in March, eighteen top political leaders negotiated in Hill Top Palace in Tananarive, the capital city. Antoine Gizenga did not show up. When the meeting ended, it was announced that a new confederation of sovereign states had been formally created. Joseph Kasavubu, who termed the conference "a resounding success", was unanimously chosen president of the new federal system. Moise Tshombe of Katanga, who wanted something like this all along, said: "We have settled our own affairs. The East and West must now leave us in peace and keep their hands off the Congo."

In the newly created Federation which would replace the old central government, twelve states, perhaps, each under its own president, would replace the present six provinces. Boundary lines would be redrawn to reflect more equitably ethnic and tribal factors. The independent state presidents, together with the President of the Federation (Kasavubu), would act as a "Council of States" to determine the internal and international policies of the Federation. Decisions would be taken unanimously; an executive agency would carry them out.

The Hill Top conferees also agreed to maintain law and order in the country, to avert civil war and restore peace throughout their own areas; and they confirmed a recent military pact between Katanga, South Kasai and Leopoldville—a sign of growing unity.

Hopes for still more unity were bolstered when, near the end of March, the Congo Conciliation Commission reported that "among many leaders" (including both Lumumbists and the supporters of President Kasavubu) there is "a general feeling of weariness and a sincere desire to reach agreement with their opponents".

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Russia Renews Attacks on Hammarskjold

Soviet Foreign Minister Gromyko, however, had not wearied. In the Assembly he lashed out again at Mr. Hammarskjold. U. S. Ambassador Stevenson retorted that Gromyko had spoken "in the worst and most destructive traditions of the cold war. We must not allow the U.N. effort to be wrecked."

On hand to prove that the U.N. effort had not as yet been wrecked was the controversial man from India, Rajeshwar Dayal, who represented the U.N. in the Congo. Dayal reminded the Assembly that, despite everything, the U.N. operation had not folded, the country had been kept afloat, civil war had not erupted into violent conflict and the most flagrant forms of external intervention had been prevented.

At this moment, France, the first major Western power so to act, declared itself unwilling to pay any part of the costs of the U.N. military operation in the Congo.

Mr. Hammarskjold has estimated that 25,000 U.N. troops will be required to fulfill U.N. commitments in

the Congo. India already has contributed a battalion of 3,300 fighting Gurkhas to help strengthen the depleted force. When the first 1,000 of these arrived in Katanga, Moise Tshombe again became a hostile host. The presence of U.N. troops "could mean a declaration of war", he said. As far as Katanga is concerned, he added, the second Congo unity conference to work out details of the new Federation was suspended. Several skirmishes and a brief period of argument between Tshombe and the U.N. over control of the U.N. airport in Katanga marked the following days. When the conflict cooled, the U.N. airlifted another 2,100 Gurkhas from Dar es Salaam in Tanganyika to Kamina base in Katanga without violent reaction from Tshombe.

President Kasavubu and his army commander, General Mobutu, have made several overtures to Gizenga in Stanleyville to try for peace. Gizenga, however, has opposed the Federation; he wants parliament to meet, it was reported, prior to any changes. Unity conference members, on the other hand, are anxious to complete the Federation first, and then convene parliament to legalize it. Adlai Stevenson publicly expressed his belief that federation is "the best hope for the Congo".

Tshombe's Katanga Province Helped by Belgians

By the time of the second unity conference in Coquilhatville before May Day—which Tshombe *did* attend and Gizenga again did not—the U.N. had amassed 6,000 men, one third of its entire Congo force, in Katanga. President Kasavubu, under increasing U.N. strength and pressure, had cast his lot with the U.N. now and felt able to challenge Tshombe and deal with difficult Katanga once and for all. Tshombe has been operating his province, the Congo's richest, with the assistance of Belgian advisers and technicians. Katanga's army contains many white mercenaries and is considered the best in the Congo. Because Tshombe likes things the way they are in Katanga he has been a constant enemy of Congo unity and U.N. intervention. At the second unity conference he demanded the rejection of the U.N. program for stabilizing the Congo.

Kasavubu, now the U.N.'s ally, agrees that all foreign civilian and military advisers must go. He appears more determined to bring Katanga under some kind of central control, and to disarm Tshombe's army and get rid of its mercenaries. When the issue was joined at the Coquilhatville meeting, Tshombe angrily walked out—into an airport waiting room and into the waiting arms of central "bodyguards". Foreign Minister Justin Bomboko said: "We are responsible for his security if anyone should try to assassinate him. . . . We fought against Lumumba, who wanted to destroy the Congo. We will fight everyone who follows Lumumba's example."

Bomboko accused Tshombe of "acting against the interests of the Congolese people", and of "coming to the conference here solely to wreck it". He will be detained indefinitely, Bomboko said.

The conferees returned to their discussions and demanded that all private armies (those not recognizing the authority of Mobutu) be disarmed, including Gizenga's. The conference also asked Kasavubu to oust all foreign diplomats from Stanleyville, Gizenga's capital, and urged Kasavubu to use the U.N. to help unify the Congo.

News that the bodies of twenty-four Ghanian U.N. soldiers had been found in the Kasai River at Port Francqui, where Congolese army troops attacked an outnumbered U.N. garrison, was disturbing.

Many Factors Are Responsible for Congo Chaos

In some important respects the situation in the Congo is improving. But several of the numerous factors which have entered into the unhappy state of affairs in the Congo merit special mention.

That the Congolese people were not adequately prepared for independence is painfully clear. An elite capable of operating the complicated departments of government—civil servants and a group of professionals—did not exist. The Belgians left only seventeen university graduates, and not one Congolese doctor, lawyer or professor. No soldier in the army ranked higher than sergeant. Britain and France have followed more successful policies in bringing their former colonies to independence.

Irresponsible nationalistic propaganda characterized the pre-freedom utterances of men like Lumumba, who promised the people almost everything —immediate pay hikes for all soldiers, an automobile for each person, etc. *Freedom* would be magic, *independence* the promised land.

Excessive regionalism, diversity and tribal tensions have posed serious difficulties. The Congo lacks a fundamental spirit of unity, of nationhood and, in this sense, is not a "nation". In the past the country was held together by alien control, but little was done to develop its human resources or equip the Congolese with the necessary tools for handling their materially rich new sovereign state.

Of ethnic groups, there are Bantu (the largest), Sudanese, Nilotic, pygmy and Hamitic peoples. Many languages and dialects are spoken, and the several religions in the Congo include animist, Roman Catholic, Protestant and Islam. Carving out new states along tribal and ethnic lines will help.

The national army has proved unreliable. Its failure to control its own men was most conspicuous right after independence when the men revolted, demanded their promised pay raises and dismissed their Belgian officers. When reports of raping and looting spread, a mass exodus of Europeans quite naturally began.

In addition, it has been next to impossible to localize the Congo problem. The ambitions of leaders of some other African nations have penetrated the Congo, influenced various groups and factions and helped to keep the pot boiling. "Pan-Africanism" had its effect, though this may be changing in relationship to the Congo. At the resumed session of the fifteenth Assembly, President Nkrumah of Ghana, the only chief of state present, appealed for stronger U.N. action in the Congo. "If speedy and effective action is taken now in the Congo", he told the delegates, "the U.N. will have that prestige

and moral backing which it must have if it is to tackle other even graver world problems."

Because of the disorder and anarchy, and the power-vacuum thus created, the Congo has been a perfect cold-war battleground. Russia feels the West has used its influence to thwart its designs; hence, Mr. Khrushchev's sustained attack on the Secretary-General and his office.

And the Congo budget problem leaves the U.N. wondering what actions it may embark upon with hopes of completion.

U.N. Financial Crisis

A deepening financial crisis, which had come to a head but was not solved by the time the second session of the fifteenth Assembly adjourned on April 22, 1961, confronts the United Nations with perhaps its most critical challenge. An increasing number of nations are pleading either inability or unwillingness to pay their assessments for the security operations of the U.N. and for the Congo in particular. Congo expenses, for example, are assessed at the rate of 32.51 per cent for the United States; 13.62 per cent for the Soviet Union; 7.78 per cent for the United Kingdom; and 6.40 per cent for France. It is well known that Russia has refused to pay anything toward the Congo operation: neither has it paid a ruble for the U.N. Emergency Force which was sent to the Middle East in 1956. By the end of 1961, the combined deficit for these two forces—the Congo and the U.N. E.F.—will amount to $80,000,000, a sum greater than the $73,000,000 U.N. budget for 1961.

It costs $10,000,000 a month to keep the U. N. in the Congo; Mr. Hammerskjold was forced to draw on the U.N. working capital fund and to borrow from the Special Fund to pay Congo bills. In 1960, Congo costs totalled $60,000,000, of which the United States paid almost 50 per cent.

It was with money problems of this magnitude that the Assembly's budget committee was wrestling when France declared it would not pay any part of the costs of the Congo military operation because it disagreed with U.N. policy. On the same day, nineteen Latin-American republics said they could not pay their full shares because of severe economic strain at home.

To save the U.N. from financial collapse, the U.S. pledged $47,500,000 of the $100,000,000 required to keep the Congo operation going for the first ten months of 1961. Again, this was almost one half of the total. However, Philip M. Klutznick, the U.S. delegate, told the budget committee that his country was prepared to make this sizable voluntary contribution over and above its normal assessed share "on the understanding that there is a general recognition that all member governments have an obligation . . . to pay their fair shares of these expenses. . . . We firmly believe that these payments, except for hardship cases, should be mandatory."

But the Assembly, at its final meeting on April 22, failed to approve a $100,000,000 budget for the Congo through October, 1961. A simple majority voted in favor of the plan (45 to 25), but the resolution was denied the necessary two-thirds majority by Soviet and Latin American opposition. Twenty-three nations did not even vote. The situation was temporarily saved by a last minute compromise.

Between the two world wars the League of Nations failed because its members were, for their private reasons, unwilling to support it. They were unwilling to support the sanctions voted against Italy when Mussolini invaded Ethiopia, and they were unwilling to resist Japanese aggression. In short, the members were unwilling to put teeth into the League and were, therefore, incapable of making it work.

So, today, the members of the United Nations must be careful to avoid the danger of refusing to support and pay for the basic security operations of the U.N. It would be unfortunate if the lessons of the League went unlearned. Financial non-support can be just as crippling as any other kind. No useful purpose is served by approving a Congo operation unless the members are willing to pay for it. A failure of will can be crucial.

Each nation today has a duty to the world community in addition to its purely national interests. Each needs to balance its interests so as not to disregard the security and welfare of mankind in which it is involved—which has little hope of realization without an instrument for international cooperation.

The Congo is not without assets. Many observers are increasingly hopeful about its future. Dr. Ralph Bunche, the U.N.'s top aide in charge of the Congo operation, cannot "agree with the pessimists about the Congo, those who predict that under independence it will revert to jungle. The Congo is not poor in resources . . . has good rivers and facilities. . . . Given a functioning government, the Congo should not have insuperable difficulty."

Despite Russia's efforts to spoil the Congo affair and nullify the effectiveness of the Secretary-General and the United Nations, there is a chance that the Congo mission may yet succeed, strengthening the world organization in the process. And this is possible at a time when it would be obvious folly to weaken or destroy the U.N. and turn loose into the world at large the controversies, passions and conflicts which now may be vented *within* the U.N. But this chance may pass. It lies with those who value at least the struggle for decency, law and order to save it. We must avoid disillusionment and despair. We must persist and we must be durable, and the countries of the Western Alliance can show the way by their own example.

During the budget debate at the U.N., Senator F. M. Blois, of Canada, said:

> Any organization which has to rely so heavily on short-term measures to finance its daily regular work, as well as its all-important peace-keeping operations, is in grave danger of being permanently damaged as an instrument in which the member nations can place their trust and respect.

It is the responsibility of the members themselves to keep their organization trustworthy and respectable. If the U.N. does not meet challenges to the peace, said Senator Blois, if it fails in this, it will go the way of the League of Nations.

The Tuition Tax Credit Plan: Sound Aid for the Colleges and Law Schools

The proportionate declines in bar admissions and law school enrollments spell trouble for the legal profession. Law schools face the problem of inadequate funds for salaries and scholarships. The best hope for relief so far, Mr. Crotty says, is the tuition tax credit plan, which he calls a sound approach much to be preferred over a "federal-aid" plan that would ignore law schools in favor of the sciences and engineering.

by Homer D. Crotty • ***of the California Bar (Los Angeles)***

THERE IS increasing concern at the Bar over its failure to recruit new members in numbers at least to keep up with our advancing population. A few years ago, Dean Albert J. Harno called attention to the decline in law students and the effect the decline would have on the practice of law. Occasionally, Reginald Heber Smith has given us some statistical observations on this decline, but he questions in his latest article whether the decline has not been reversed.[1] At the urging of the American Bar Association's Section of Legal Education and Admissions to the Bar, past President Whitney North Seymour organized a strong special committee to study current needs in legal education.

First of all, it is well to see what the decline in new admissions amounts to and how that decline affects different parts of the country. There is a certain distortion if we consider admission statistics on a national basis over a period of ten years only. After all, admission is by state. There is no such thing as national admission. Figures covering the last decade or so are subject to movements which can be readily explained, such as the bulge in new admissions after the last war. This heavy post-war surge of new bar admissions culminated in 1950 when 13,641 new lawyers were admitted. In 1959 the number passing the Bar had declined to 10,142. The huge post-war baby crop is affecting the colleges, but it will not reach the law schools until the middle 1960's. Then it can be determined whether we have a deluge or merely a flash flood.[2] If present indications continue, the prospects for a deluge are fading.

In 1932, at the depth of the depression there were 9,340 new admissions in the nation, while in 1959 the annual number was 10,142, an increase of less than 10 per cent. Meanwhile, the national population had increased 45 per cent.

Bar Admissions Do Not Match Population Increases

More striking are the results if we compare the admission figures in some of the states. In 1932 New York admitted 2,438 new lawyers, in 1959 only 1,940—a startling decline although New York's population had risen approximately 25 per cent. Illinois in 1959 admitted 603 new lawyers, a substantial drop from the number it admitted in 1933, although its population had increased 32 per cent in the interim. Again, notwithstanding the fact that the population of Texas had nearly doubled between 1932 and 1959, Texas in the latter year provided approximately a 50 per cent gain in new lawyers over the earlier date. A dramatic 90 per cent increase in new lawyers in California in 1959 admissions over the year 1932 is overshadowed by the fact that California's population in that quarter-century had nearly tripled. Many other examples can be given. We can conclude that the number of lawyers is not keeping up with the population, and indeed in certain states there is an absolute decline in new admissions.

Law school enrollment has risen from its post-war low of 40,158 in 1955 to 43,695 in 1960. Here again there is no consistent pattern of increase or decrease. Let us take the four states named above as examples: New York shows a 6 per cent and Texas a 9 per cent drop, Illinois an 18 per cent and California a 35 per cent gain, with a greater percentage of increase in the unapproved California law schools than in those schools approved by the American Bar Association.

If the trend continues, and indeed if the brighter boys are enticed into engineering and the physical sciences, unquestionably there is trouble ahead for

1. Reginald Heber Smith. *Admissions to the Bar 1958-1959: Has the Downward Trend Been Reversed?*, 46 A.B.A.J. 1201 (November, 1960).
2. Joiner. *The Coming Deluge: How Goes Our Ark?*, 9 JOURNAL OF LEGAL EDUCATION 466 (1957).

the legal profession. Many causes for this decline have been given—early marriage and family formation, the longer periods of graduate study, increases in the cost of living, inadequate scholarship moneys, and more difficult recruitment for the law teaching profession.

Salaries, Scholarships Require Improvement in Law Schools

Without exception the law schools in the United States are in need of substantial financial help, not alone for scholarships but for improved faculty salaries. For decades law school scholarships have been and still are woefully inadequate to help properly the students' financial difficulties.

The current studies of the Section of Legal Education and Admissions to the Bar show that ninety-eight law schools have less than $15,000 a year in scholarship money. Of this number, twenty have less than $10,000 a year, fifteen have less than $5,000 a year, thirty-three have less than $2,500 a year, and six have no scholarship money at all. Of the remaining number reporting, thirty-three, or approximately 25 per cent of the approved law schools, have $15,000 a year or more available for scholarships.

In law schools where the scholarship money is low, it is divided among several students, with small and inadequate amounts for each. For example, the $2,000 annual amount at the University of Oklahoma is spread among seven persons. The University of Washington shared its $7,750 with twenty-six holders. The scholarship holders at the University of Michigan fared better—162 persons were helped by the $106,794 available.

State-supported law schools usually have lower fees than the law schools connected with independent colleges. Thus the law school at the University of California at Berkeley, with its annual fees of $136.50, competes with the tuition charge of $1,005 at Stanford Law School. Berkeley divides $40,375 in scholarship money among seventy-one students, while Stanford shares $24,195 among eighty-two students.

Scholarships in the law schools are deplorably inadequate. Surely their meagerness is a main cause of the drift away from the professional schools. Some improvement has been brought about by the annual giving campaigns which many of the law schools have started. The sad fact confronts us, however, that not many lawyers give anything at all to their law schools. Contrast this with the fact that the medical profession has lately raised its annual giving program to a figure exceeding $4,000,000.

Law Faculties Must Compete for Recent Graduates

Law faculty salaries are greatly in need of increases. There is frantic competition for the law graduates with good records. Business wants them, government wants them, and the metropolitan law offices all want them and are willing to pay them well. Unless the law schools can compete on introductory salaries, law teaching inevitably will suffer.

The salaries which should be paid are those which will attract and retain high-standard men in the law schools. The starting salaries in government, business and large metropolitan law firms have risen to a point where most law schools cannot meet them in attracting new men. If the quality of the teaching profession suffers, the quality of the Bar also must suffer. Our aim must be not to get just someone to teach but to get the best man possible to teach, otherwise there will be a continual drift downward in instruction.

Law school salary information first became available in detail in 1952. At that time the national median salary for law teachers was $6,350. Attention was called to this deplorable situation by the Section of Legal Education.[3] Year after year the Section has exerted considerable pressure to improve law school salaries. It can now report that the national median for 1960 salaries has risen to approximately $9,000. What is distressing is that the hiring salaries for new law teachers in almost one half of the law schools of the country is less than the salary offered to the high ranking law school graduates by business, government or the metropolitan law offices. Indeed, in five of the law schools the starting salary does not reach $400 per month.

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How long will the Bar allow this unsatisfactory and dangerous condition to continue?[4]

Tuition Tax Credit Plan Offers Hope to Schools

This paper is concerned with one means which it is hoped can offset some of the disadvantages from which the law schools suffer. This assistance would take the form of the proposed tuition tax credit plan, affecting tuition for students in institutions of higher learning above the twelfth grade. It would give to the taxpayer a credit on his income tax of 30 per cent of the tuition paid by him to such institutions, with a $450 annual limit for each student's tuition. The credit is for tuition only and not for room and board, traveling expenses or incidentals. Bills have been pending in Congress for some time to provide this credit but have not been enacted.

3. Crotty, *Law School Salaries, a Threat to Legal Education*, 6 JOURNAL OF LEGAL EDUCATION 166 (1953).

4. See, Robert Emmet Clark, *An Open Letter to a University Board of Trustees*, 46 A.B.A.J. 1330, (December, 1960). See especially, *Memorandum Attached to Professor Anderson's Letter to the Board of Trustees*, ibid 1335.

The tuition credit would bring substantial aid to the colleges and professional schools in this way: if adopted it would enable the institutions to raise their tuition approximately 42 per cent. For example, if there were a tuition charge of $1,000, a 42 per cent increase would raise it to $1,420; the tax credit would exceed slightly $420, and by virtue of this tax credit the taxpayer could meet the increased tuition without adverse effect.

Association Section Endorses Tuition Tax Credit Plan

The Section of Legal Education has unanimously endorsed the tuition tax credit as the most helpful suggestion so far made for improvement in the law school financial situation. In its report the Section said:

> The 30 per cent tax credit for tuition paid clearly meets these specifications, the time is desperately late, our institutions of higher education have suffered from inadequate financing for at least fifteen years, resulting in a pitiful pay scale for faculties, inadequate maintenance of plant and a great shortage of scholarship funds. Surely the time has come when we are ready to act. As President Griswold of Yale University stated three years ago—neglect of our universities has placed "the mind and spirit of American democracy in danger of its life."

The advantage of the tuition tax credit is that it helps not alone the state law schools, but also the independent and denominational ones. No discrimination in financial help should be made because the law school is not a publicly supported one.

The tuition tax credit, of course, adds another section to the Internal Revenue Code, and its enactment would result in some loss of national revenue to the Treasury. What matters that, since it is proposed that Congress appropriate huge sums for the support of higher education? The support unfortunately will doubtless overlook the needs of the law schools in favor of the sciences and engineering. By using the tuition tax credit the taxpayer at least will know where governmental support is going.

The entire Bar should back the tuition tax credit plan with vigor. It offers the most likely chance of constructive relief to the law schools.

Some Reminiscences

Mr. Justice Whittaker addressed the Assembly at its third session, held August 10, during the Association's Annual Meeting in St. Louis.

by Charles W. Whittaker • *Associate Justice of the United States Supreme Court*

INSTEAD OF YOUR welcoming me here, I should be welcoming you—and I do so. While this is not my home city, I lived and practiced law for more than thirty years in its environs and shadow, over in Kansas City! But the Bar of St. Louis was always good to me, for they welcomed me here on occasions while I was still practicing at the Bar, and it later became my very good fortune to serve the lawyers of this area on the United States Court of Appeals.

First, may I say it is a warm and satisfying pleasure to be here. Everybody says that, so it must be true, and I therefore adopt it! But, seriously, having nearly always been enraptured by the society of lawyers, particularly those who are old friends and thus fit as comfortably as an old shoe, you can easily imagine, I suspect, my relaxed and genuine pleasure on this occasion.

I have been away for a substantial time. It has now been four and one half years. In that period, things have changed somewhat. Many scenes and also faces have vanished, but memories warmly linger on. In this sea of faces I find some that are new, but most are old and familiar. In every direction I see faces of men and women with whom, for more than thirty years, it was my task to vie and my duty to contest, both in and out of court, and whom, for a short time—much too short a time—it became my privilege to serve, first, as a district judge and, later, as an appellate one in the federal system. Though, sadly for me, all of this has changed, my sight of you stirs some memory that, now at least, is pleasant!

Your President, Whitney Seymour, and his able cohorts, have been pestering me for a long time to come here and speak to you today. I was told, of course, that I was wanted for my own sake—although, having heard *sub rosa* that it's difficult to maintain interest in the closing days of the Association's activities, I suspected that what really was wanted was a curio—something that they hoped might pack 'em in, a person that people would turn out not so much to hear as to see. It seems that a justice very well meets those specifications, as there are fewer of them in existence than there are monkeys out here in the Forrest Park zoo.

I had thought, and had been told, that to be a justice put one in a rather exclusive society, but those of us who have attended this meeting realize, I think, as I never have before, that, actually, he is just one of the common herd, and this brings to mind an old story which occurred in this, my home state.

A lawyer by the name of Clear, one of those ubiquitous souls of the long past, was arguing a case before the Supreme Court of Missouri and, in his earnestness, he was continually citing, as precedents, the judgments of Mr. Justice Peffley.

Finally, the Chief Justice said, "Mr. Clear, the court is not aware of Mr. Justice Peffley. Would you tell us who he is?"

Mr. Clear said, "Mr. Justice Peffley is a justice of the peace of the Fifth District of Jackson County, Missouri."

Thereupon the Justice said, "The court doesn't care to hear any more references to the judgments of Mr. Justice Peffley", and, thereupon said Mr. Clear, "What a coincidence! Many times have I heard him make the identical statement about the judgments of this court!"

Something within continues to question the wisdom of my effort and decision to make a speech to this organization composed, as it is, of men and women, many of whom have known me and my history so well that I cannot hope to attain the advantage of the mysterious or the distant, and where almost each of you is his own eye witness of the past.

Now, throughout this week you have been engrossed in certain serious and, I hope, profitable considerations, and I think you might welcome a little coasting, so that you will not really mind if I do not indulge in heavy discussions of legal imponderables, for I am tired of them—I mean, I am tired of them not from what I have heard here, but tired of them from the past year's hard work—that you will not mind if I do

not indulge in such but, to the contrary, permit my remarks to cover more latitude than altitude, perhaps salted only occasionally with a serious grain of thought.

Now, do not be disheartened by the published title of my speech—and I promise you, it will not be overlong. You know, you have to have a title; the Program Chairman and others insist upon it and, so, when pressed, as I knew I would be, to name the subject, I was ready. "Some Reminiscences", I said. Now, this seemed to satisfy them. But it could not have left them any wiser than before!

Now, I regard that title as having most of the qualifications of a Mother Hubbard, and at all events, I think it need not cramp our style on this occasion. I was asked, on coming into the room, if I had a manuscript, and I said to the lady, "I am just going to rehash an old speech", and she said, "I would like to have a manuscript."

I said, "I have only the one."

"Well," she said, "will it be published?"

I said, "Perhaps, posthumously!"

And she said, "Well, I hope it won't be long!"

In recent years, my work has brought me in touch with a great many more lawyers—particularly government lawyers—than before, and I cannot avoid comparing, at least in part, their lot with that of the private practitioners. I find that they are usually highly trained specialists, of fine honor, but inclined in some cases somewhat toward the ephemeral and complex. They have many advantages, however. They represent the largest and most powerful litigant in America, and perhaps in all the world. Its fingers, at least in comparison with those of private litigants, are incalculably long. I have never heard it suggested that its lawyers are ever forced to forego any needed investigation or research for want of facilities or funds. Do you have a comparable abundance in your private practice? In addition to those advantages, and the not inconsiderable advantage before juries—and I may add before some courts—who incline to believe that they really are the government's guardians, the government has the advantage of a loud voice in the Congress respecting legislation, as they say, to "fill in the gaps" or "plug up the holes", when, in those rare cases their own administrative agencies have been unable to do so by rule or regulation. These, I think and believe you will agree, are rather super powers for a litigant to possess, and with them, one may wonder that the Government ever loses a case. But nevertheless it does. It does lose cases. And I can assure you that although it is, by all odds, the largest litigant in your nation's highest Court, it is not there a preferred litigant. That it may obtain the grant of a higher percentage of its petitions for certiorari, and even win a higher percentage of its cases on the merits in that Court than private litigants, is not evidence to the contrary. The Government, out of an extremely large volume, picks the cases it will present to the high Court—a privilege not possessed by any private litigant, however large—and this alone explains the percentage difference in results.

We lawyers proudly boast that, under our legal system, all litigants are equal before the law. And we try to make this literally and uniformly true. But it seems to me there is cause to question whether we actually succeed. I had the pleasure, today at noon, of attending the joint luncheon of the Committee on Legal Aid Work and the National Legal Aid and Defender Association, addressed by the Honorable Emanuel Celler, Chairman of the House Judiciary Committee, who for many years has been active in this subject. I learned a few things about it; he made a very fine speech. An admittedly extreme example is reflected on the mirror of memories, and doubtless you have seen it yourselves. I visualize a dark-skinned youth sitting at the counsel table, accompanied only by unpaid counsel, in the solemn atmosphere of a federal court. The black-robed judge formally calls for trial the case of *The People of the United States of America against Willie Jones.* Well, surely that announcement of the impending contest sounds unequal. And can we doubt that it so seems to that defendant and even his appointed unpaid counsel? Do you feel that in these circumstances—or even in others not quite so aggravated—it would be conscionable for the court to give the Government the "breaks" of the trial—for "breaks" there will surely be—or should the defendant get them? Or, should they, like doubts—which is what they are—go to the accused defendant? I must confess a sympathy for the latter view. Yet, it has been my experience that most district attorneys feel compelled to claim them. Now, this is not to say that prejudice should prevail to any degree on either side of the true line of truth! It's only to say that "breaks" like doubts—for that is what they are—should go to the accused.

As Americans we proudly proclaim that all men are created equal, and from that premise we lawyers go on to reason that all lawyers are equal. But I slyly suggest that there may be some error in this, for it has been my impression that some lawyers are a little more "equal" than others. This is not an impression lately gained. It derives from impressions received when, as a young lawyer in, as I have said, my nearby home community, I admiringly watched the maneuvers of the giants at the Bar. The impression was, and the intervening years of practice have only strengthened it, that all men are not equal, save in the sight of God, and that what we really mean, if more than that, is that all men are entitled to equality of opportunity; and that is but an opportunity to prove unequal talents.

If I may reminisce—and it seems permissible these day for justices to reminisce—I see some of you have been reading Felix, and my brother Tom—and, frankly, that's the source of my idea! I go back to a scene laid nearly forty years ago in the assignment division of the courts in my home city, Kansas City, Missouri. The room was full of lawyers attending the assignment of cases to particular divisions for trial. Business was proceeding routinely until a particular case was called and there was no answer for defendant. A defendant without counsel, I thought—a predicament that concerned me then, but which has more recently become a torment. I do not see how we can expect to insure the concept of due process to accused persons who have no lawyers. With some agitation, the court asked a second

time, "Who represents the defendant?" Presently there entered the courtroom a tall, broad-shouldered, erect and graceful man, graying at the temples, who, as he proudly approached the Bench said, as only he could say, "Your Honor, I represent the defendant." I did not then know who he was, but I did know, from the manner of his announcement and presence, that the defendant was really represented! This man I was to come to know as James A. Reed who, for so long a time, so admirably represented our state in the halls of the Senate, and with whom, as fortune willed in later years, it became my duty, on a few occasions, figuratively to cross legal swords. Pains of inadequacy troubled me then even as they do now.

Indelibly fixed in my mind and, I suppose, it always will be so, is his closing argument to the jury in a certain bodily injury case in which his client, a boyhood friend, had lost a leg in a railroad accident. Note its power.

> Back in the little town from which we came, Louis Jones and I were schoolmates; we laughed and played together, we hung our clothes on the same tree and swam in the same old swimming hole, a finer physical specimen I had never seen. But as I look at him now, torn to shreds by the negligent act of this defendant, can you wonder that my heart cries for him in sympathetic pain?

Feeling that this argument was designed to appeal more to the passions and prejudices of the jury than to the controverted issue of negligence—for really, we were not denying that the plaintiff had lost a leg—I made an objection upon that ground. And after it was overruled, improperly, I thought, came this retort:

> Counsel, who so heatedly objects to what I have to say on behalf of my old friend Louis Jones, must be actuated by the same motives as spurred the woman of bad repute to object to a reference to virtue in her presence because it hurt to the core.

On our appeal from the judgment, I was, of course, able to present what he had said, but never quite able to capture and present just how he had said it. Which, as every trial lawyer knows, makes quite a difference with a jury.

Charles Evans Whittaker

You may well imagine what this did to my notions of the theory that all men—all lawyers—are equal.

Like many of the eminent trial lawyers of that day, his tongue was very versatile, and depending on the mood, which he seemed able to create and control at will, it could be sooth like slumber or cut like a sword. Its cutting swath may be seen in his characterization, in a trial, of a valued newspaper client of ours with which for years he was at open war.

> If ever that sewer rag, the *Kansas City Star*, or its vermiform appendage, the *Times*, has anything complimentary to say about me, I want you to write to my dear old mother and tell her that her good boy has gone wrong.

And again, upon the death of the then publisher of that newspaper, he was asked if he had heard the news. He answered:

> Yes, with a moderate degree of sadness. I have never wished anybody's death, but I have read some obituary notices with considerable satisfaction.

Continuing my reminiscences, may I say that throughout my more than thirty years of active practice at the Bar, many of them in the trial of cases, which, by the way, I dearly loved, I was almost constantly plagued with doubts about how best to cope with the arts and wiles of opposing counsel. Experiences could be endlessly related out of an experience so long and colorful, but the following must suffice as typical.

Clever counsel for the plaintiff, who was blind and suing my client for causing her blindness, concluded his examination of his client by facing the jury, pointing his finger heavenward and asking this question: "Now then, Mrs. Robertson, from that day to this have you been able to see the light of day?" The answer was a sob and a muffled "no". Then turning to me and bowing from the waist, he said, "You may cross-examine." Just how do you go about cross-examining such a witness in those circumstances? I have to say I did not learn the answer to that question in that case, nor in the many similar ones I was to try.

In addition to the problems of coping with opposing counsel, I have had my share of troubles with the courts, and I ask you to indulge me while I mention just a few. Often—too often, from my point of view—when pressing a determinative mixed question of law and fact upon the trial judge, he would decline to go deeply into the matter, saying, off the record, that the question was really beyond his competence, and anyway it would have to be determined by the Supreme Court. But, on the record, he simply ruled against me. Then, on the appeal, the appellate court would often—too often—utter, if indeed it would not sing, the familiar language or perhaps I should say "tune": "Great deference is to be paid to the ruling of the trial judge and he is not to be convicted (note the word) of error in the absence of a clear and strong showing by the appellant, upon whom the burden rests", and the Court would then simply affirm the judgment. The result was that the "buck" was passed from the one to the other, and back again, and fumbled at both places and no real considered judgment ever was given to the determinative question in the case. It was, and it is, my view that when the question is one of law, no such deference should be paid to the ruling of the trial court, and certainly no heavier burden should rest upon the one than upon the other of the parties. The effort, it seems obvious, should be to determine the answer to the legal question, not whether the trial judge is innocent—for the Lord knows most of them are plenty "innocent"—and hence not to be "convicted" of error.

Not infrequently, too, I fell victim to that process of reasoning—if again it is not indeed a song—that goes something like this: "This case involves a remedial statute which, under familiar rules of law, must be liberally construed." And then the court, under the guise of liberal construction of the statute, proceeded also liberally to construe the facts. Is not this, in your experience, a prime breeding place for the miscarriage of justice? If more fidelity is to be paid to the details of one aspect of a lawsuit than to another, it seems to me it should be to the facts. Legal questions do not arise in a vacuum. (And, I pause to add parenthetically, this should be true even in the Supreme Court.) They arise only in relation to particular facts, and slight differences of fact often make wide differences in result. Surely, there is no warrant for liberal construction of the facts even though governed in legal consequence by a remedial statute.

And, while on the subject, may I ask you just how are statutes to be construed? Volumes have been written on the subject. But, as Judge Learned Hand recently said, "They haven't advanced us very far." Perhaps Professor Llewellyn of the University of Chicago was delving deeper than he thought in his recent clowning on the subject:

"Do you want to know how to construe statutes?" he asked. "I'll tell you how to construe statutes. 'Every statute in derogation of the common law is to be strictly construed.' Right? Right. 'Every remedial statute is to be liberally construed.' Right? Right again. But every statute in derogation of the common law is remedial; every remedial statute is in derogation of the common law. Now! [h]ow do you construe statutes?"

Being unable, after more than thirty years of effort at the Bar, to overcome my deficiencies in coping with such matters as I have mentioned from the arena, and looking to what appeared to be vast opportunities for improved public service of the Bench, I thought it would be good to become a judge, and so, in baseball terms, I got on; and, with the support of a good team, was enabled to touch three bases in three years. I went to first on a walk, to second on a fielder's choice, and, on the second pitch thereafter I was sacrificed to third. First base, the district court, being close to the dugout of the home team and its fans, was a perfect delight; second base, the United States Court of Appeals—particularly the Eighth Circuit—while a little more removed from the people, was a very quiet and comfortable position. But third base, I found truly to be, as the fans say, "the hot corner". Then came the most solemn quest for light that can proceed from the broodings of a human soul.

People, free of the awful weight of ultimate responsibility, are likely to be persuaded by prejudices and passions, and to voice them, sometimes irresponsibly and whether in good taste or not. But, may I say to you that any normal man called to the Supreme Court of the United States will find the weight and volume of his responsibility a most sobering experience. The literature of the law is nearly endless and its growth is unabated. Technological developments and the tremendous growth of our country have opened new vistas that cry daily for resolution. And many of the rules of decision were devised for other times and conditions. Statutes are not always clear, even when applied to subjects which Congress had in mind, and particularly are they not when applied to subjects it appears not to have contemplated or foreseen. Yet, the Court, faced with a concrete case for decision, cannot seek counsel of the Congress, but must proceed to decision upon its best understanding of the legislative will, or upon what it thinks would have been the legislative will if Congress had thought about the matter. Our Constitution, too, designed for the ages, is in many respects wisely vague and hence sufficiently elastic to adapt to the changing conditions and mores of advancing times. The plain fact is, as often has been said, the Constitution does not interpret itself, and simple necessity, as well as history and logic, have cast that burden upon the Court. Precedents for almost any proposition can be found, and questions presented are often so razor-sharp that they might be decided either way with almost equal support of precedent and reason. Ladies and gentlemen, the

Court does not seek its problems, but it cannot avoid decision of those presented. It must act, and so it does, according to the oaths and consciences of the justices and their best understanding of the laws' commands.

It is too much to expect, in these circumstances, that even nine men, though equally dedicated and devoted, will view all things alike. And hence we frequently divide, and firm dissenting views are often stated in strong language, but I am happy to say to you that mutual respect is such that this is nearly always done without personal rancor or ill will, and that, at least outside the conference room on Fridays, we are a reasonably happy family.

Since the function of the Court is to resolve great issues, it is inevitable that it must proceed in the midst of tensions, and it always has. The very nature of its duties fate is to be the target of almost continual criticism. This is inherent in the process, for there will be dissatisfactions in every case as every lawyer knows, for only one side can win and the loser is never pleased. The winner gets only that to which he believes he is entitled. The loser and his adherents, being human, feel that they are victims of injustice. And the greater the importance of the issue the higher the pitch of tensions will likely be. But I know you will agree with me when I say that it is of the essence of orderly government that the Court's decisions be accepted and obeyed. It would be idle to tell a group of lawyers that down the other road lies only chaos and calamity, for this you know as well as I.

Being composed of human beings, the Court has doubtless made mistakes and will make them in the future, regardless of who may be its justices.

As President Coolidge once said:

> It is not necessary to prove that the Supreme Court never made a mistake; but, if the power is to be taken away from them, it is necessary to prove that those who are to exercise it would be likely to make fewer mistakes.

That, I think, fairly well states the issue.

My brothers have said:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.
>
> [Mr. Justice Black.]

And that,

> Judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt. [Mr. Justice Frankfurter.]

This, today, no one, certainly not I would deny. But it seems to me that criticism should be constructive, and to be constructive it must be advised.

Recently Professor Sutherland, of Harvard, was good and, I think, wise enough to say:

> . . . Devoted as we traditionally are to a somewhat abusive freedom of public criticism, a tradition which no wise man would seek to restrict, we inevitably turn some of our abusiveness on the Supreme Court. . . . We planned it that way—or at any rate we planned it in such a way that some abuse of the court was certain to come. And if this abusive custom seems a little hard on nine devoted . . . men . . . holding, as they perform their essential public duties, a middle course through the cross-currents of public opinion, we lawyers can perhaps, now and then, pause to say that we understand and value their work and respect their endurance.

I cannot ask you to value our work, but I do hope you will understand what it entails, and, when you do, I am sure you will at least respect our endurance.

Uniform Code of Military Justice: It Will Work During a State of War

Answering Captain George L. Richardson's argument in the August, 1961, *Journal* (page 792) that the Uniform Code of Military Justice may not be workable in time of a major war, Mr. Learner, from his background in the Korean action, declares it will. He says even-handed justice is necessary for morale, and that if the Code worked under the difficult conditions of the Korean action, it can be made to work anytime, anywhere.

by Milton B. Learner • *of the Indiana Bar (Lafayette)*

THE JOURNAL is to be congratulated for periodically granting a forum for discussion of the Uniform Code of Military Justice. Throughout the past years I have read the various feature articles and views of readers concerning this important subject. For the most part the feature articles represented opinions of lawyers based on temporary experience in the Judge Advocate General's Corps. In many instances they achieved their spurs in the appellate division of military justice. The comments stated in "Views of Our Readers" ranged from severe censure of World War II drumhead justice to doubtful convictions of the success of the Uniform Code of Military Justice. We now have heard from an active duty member of the Judge Advocate General's Corps, Captain George L. Richardson, through his article in the August, 1961, *Journal* [page 792].

I intend to clear the cobwebs and join the issue. I served as an enlisted man and infantry officer in the Army during World War II. During the Korean action I served as a staff judge advocate in a front-line combat division in the Eighth Army for approximately one year. The military situation involved all tactical phases of offense, defense and retreat. My duties were primarily that of trial and defense counsel, both under the 1949 *Manual for Courts-Martial* and the present Uniform Code of Military Justice. In 1953 I was separated from the service (after three years active duty) and am now a reserve officer of the J.A.G.C., battling my way through correspondence courses and summer camp in order to maintain proficiency in military justice.

Captain Richardson's article is primarily dedicated to the proposition that the Uniform Code will not work in actual combat during a period of localized war. In support of this view he reluctantly acknowledges that a modicum of success may have been achieved during Korea, but countermands with the startling theory that "the Code was new . . . any system of criminal law tends to work better in its beginning . . . also . . . the Korean conflict was a very unusual sort of war . . . it surely could not recur in just the same way". He then adds his personal qualifications gained in part during two years of garrison service in France (1952-1953), some 10,000 miles from his "localized" war.

If Code Worked in Korea, It Will Work Anywhere

Korea was indeed unusual—but in a sense other than propounded by Captain Richardson. I submit that the Korean War was fought under the most difficult circumstances facing a U. S. Army since Valley Forge. The initial onslaught was resisted by a corps of troops that had just undergone the rigors of garrison occupation in Japan. Reserves were hastily called to the colors and were immediately thrown into battle. Americans suddenly found their flanks secured by troops of heretofore unknown and untested allied countries. The American Congress split right down the middle in vociferous denunciations of a President who dared exercise his innate rights as the Chief Executive and Commander-in-Chief. This was the background in which the Uniform Code of Military Justice received its baptism under combat conditions.

If the Uniform Code served its purpose in Korea, it can serve under any conceivable future battle conditions involving localized wars. That it was successful in Korea was repeatedly acknowledged by military commanders who contended that morale among troops was high even in the face of insurmountable odds. Even after two major retreats, the Eighth Army successfully battled and regained lost ground. This required courage, tenacity, and if you please, it also required discipline.

It is contended that adequate personnel cannot be maintained by the Regular Army J.A.G.C. in view of the requirements of the Uniform Code. This is a problem faced by every

Milton B. Learner is a veteran of World War II and the Korean War and is now a major in the Judge Advocate General's Corps, Army Reserve. He was graduated from the University of Minnesota Law School in 1949 and is admitted to practice in Indiana and Minnesota.

branch of the Army. In Korea there was an extreme shortage of platoon leader officers in rifle companies. Reserves were called to fill the gap. The J.A.G.C. has the additional advantage of being able to call up reserves who are not only trained under reserve programs but who are professionally qualified in the field of law as civilians.

I readily agree with Captain Richardson that in time of war the Court of Military Appeals may be overworked. But this can be remedied by legislation during the time of emergency. Great weight is given to General Caffey's comments that submission of general court-martial records from every corner of the globe to Washington for appellate review would be disastrous in time of war. Surely this administrative problem, too, can be solved during the time of emergency.

"Korea-Type Wars" Demand Best Military Justice System

The crux of my position is as follows: Are Captain Richardson's reasons sufficient to state categorically that the Uniform Code cannot work during a period of localized war? What are the advantages gained under the Uniform Code? Captain Richardson admits that the quality of military trials has been raised to a new high. He contends, however, that the 1928 *Manual for Courts-Martial* functioned fairly well "in administering military justice to 16 million men". He intimates that a man was tried and his case quickly reviewed by boards of review established in every theater of operations. But Richardson failed to realize that the Uniform Code has obliterated that type of drumhead justice administered in a general court-martial trial during World War II.

An accused soldier today understands and fully realizes that he is getting a fair trial at the actual trial. This was not the case in World War II prior to the Code. It must be remembered that this country was united and determined in its purpose during World War II. The fact that accused were not given a fair trial did not materially affect the war effort nor the morale of the troops. But if the same type of drumhead justice had been administered during Korea, where all the elements of confusion, doubt and misgivings were present, the result would have been disastrous.

Let no one consider that future "Koreas" cannot occur. Where a war is localized Americans will always have differences of opinions as to the advisability of entering a fracas. The same split of opinion will reveal itself as it did in Korea, with the attendant morale factors present among the combat troops. Therefore, it is essential that the best, fairest and sternest system of military justice be afforded the Armed Forces. This, I sincerely believe, was accomplished in Korea under the present Uniform Code of Military Justice and will serve the foreseeable future needs of the Armed Forces.

"Drumhead Justice" Doesn't Make Efficient Troops

We civilian lawyers must be forever watchful of proposed amendments to the Uniform Code of Military Justice that appear to be based on acknowledged deficiencies but are aimed at destroying the legal triumvirate of law officer, trial counsel, and defense counsel.

In the final analysis, the battle effectiveness of a combat division will not rest primarily on quick, efficient court martials administered to its soldiers. There is no substitute for resolute, imaginative and inspirational officers and non-coms. There is no alternative to bold leadership. But whatever effect a courtmartial has on discipline, it can only be measured by the type of justice administered.

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The Federal Judiciary and the Bar

In the Bar's concern for the quality of appointments to the federal bench, the report made at the Association's recent Annual Meeting by the Standing Committee on Federal Judiciary is reassuring.

In May of this year Congress passed the Omnibus Judgeship Bill providing for seventy-three new federal judges. There were twenty-nine vacancies in existing judgeships. These, with three recess appointments and two limited-term judgeships in territorial courts brought this total to 107 judgeships to be filled. No President heretofore has had so many appointments to the federal bench to make in even an entire four-year term.

Over the past years the Association's Committee on Federal Judiciary has been building up a confidential and co-operative arrangement, under which it has performed an important advisory function. The names of those under consideration for appointment to lifetime judgeships have been submitted by the Attorney General to the Committee for preliminary screening. Formal reports have later been made by the Committee to the Attorney General. As a result in recent years no appointments have been made of any person whom the Committee has found "not qualified". Of those appointed, an average of two out of three have been found not merely "qualified" but either "well qualified" or "exceptionally well qualified". In addition exhaustive investigations have, of course, also been made by the F.B.I., and opinions have come to the Attorney General from other sources as well.

The Association's Committee has also made its services available to the Judiciary Committee of the Senate in relation to the confirmation of appointees. Its principal activities, however, have been concerned with the preliminary screening and formal reports to the Department of Justice prior to appointment.

The procedure under which the Department of Justice is the principal adviser to the President as to appointments to the federal bench is not immune to attack. That Department represents the Government which is the largest single litigant before the federal courts; and yet it is the most influential adviser to the President as to the appointment of those before whom its cases will be tried, and by whom they will be decided. This practice has become entrenched through custom reaching back into the distant past and there seems little likelihood that it will be changed in the foreseeable future. As long as it continues, the participation of the organized Bar in the process of selection is the best earnest of impartiality in the selective process.

The Committee's report is reassuring as to the present and the future. It tells us that under the new administration Attorney General Kennedy and Deputy Attorney General White are continuing the procedures under which our Committee on Federal Judiciary has been operating in the past, and that the relations between them continue to be confidential and co-operative. It says, "There is every promise that the excellent achievements of recent years in the quality of federal judicial appointments will be continued and perhaps even improved upon."

The magnitude of the Committee's work is attested by the fact that during the first six months of the present administration the Attorney General has requested the Committee to render a total of 246 informal and forty-nine formal reports, or a total of 295. The Committee has already presented 176 informal reports to the new Attorney General's office. Of the first ten names sent to the Senate for confirmation of appointment three were reported by the Committee as "exceptionally well qualified", five as "well qualified" and two as "qualified", so that eight out of these ten were among the best qualified for the office, and none was found not qualified. Although among the seventy-six nominations now made, there have been a few which did not have the Committee's approval, the Chairman of the Association's Committee reports that in general the appointments have been very good, some excellent.

The criticism that there has been too much delay in making appointments to fill these judicial positions, the Committee finds is not justified. Less time has elapsed since the seventy-three new judgeships were suddenly created than the average period consumed in the past by

any President in filling vacancies arising in normal course as a result of retirement or death.

On the record, therefore, the organized Bar should be gratified and encouraged at the continuation and improvement in its usefulness in the process of appointments to the federal bench.

The number of judges whose political affiliations prior to appointment were with either political party are now roughly in balance. Under these circumstances is it too much to hope that future appointments will be non-partisan in character and made solely on the basis of merit and qualifications for the office?

Teaching What Communism Means

At the Chicago annual meeting of our Association seven years ago, in 1954, the House of Delegates rejected a resolution advocating the teaching in public schools of what communism means. Speakers opposing the resolution expressed the fear that teaching what communism means would be subverted to teaching communism. The unanimous action of the House of Delegates at its 1961 mid-year meeting in adopting a substantially similar resolution was a wise change of attitude from the former position.

Russia under communism has made much progress in certain fields since the Czarist regime was overthrown in 1917, although Custine's[1] description of Russia in 1839 bears a striking resemblance to the Russia of today. But this progress has come about at the expense of the continued suppression of the individual rights and freedoms which we prize. These freedoms have been so much a part of our history and our lives, and we have become so accustomed to them, that we sometimes fail fully to realize their blessings. We daily turn many times the knobs of the doors of our cherished homes, but few can describe the knobs. Similarly, too few people in taking our institutions for granted can describe them. It is not enough for us merely to parrot the rights of the individual in America compared with the status of the Russian. The privileges we enjoy of turning our doorknobs with a sure knowledge of the sanctity and privacy of our homes, our lives and our society, must be impressed understandably upon our young people.

Where does the legal profession come in? Of all the professions its members should have a surer and fuller knowledge of the principles of democracy. Thus we can be of great assistance in impressing our young people with what democracy means, at the same time guarding against any possible subversion in teaching them about communism. Such subversion is an end which we must recognize will be sought by communists and persons of communistic leaning, enchanted by the siren song that communism offers a better life. A Bar alert to this possible danger is one of the great guardians of our liberties.

But to let such a danger deter us from teaching what communism means would be to create an even greater danger. It is an elementary principle of warfare to learn everything possible about the enemy. Similarly in the war of ideologies, the more complete knowledge our young people have about our adversary, the better will they be able to combat communism.

1. JOURNEY FOR OUR TIME, Marquis de Custine.

Solution or Stop Gap?

The success of the Municipal Court of Philadelphia in eliminating trial backlogs chronicled in Arbitration Commissioner Zal's article in this issue is a monument to the public spirit of the attorneys who have contributed their time at fifteen to thirty-five dollars a case and their office facilities to the accomplishment. We join the chorus of praise for them but wish to add to Mr. Zal's statements thoughts that might be lost in the volume of the chorus. Arbitration is compulsory for every case where the amount in controversy is $2,000 or less. Either party is entitled on appeal to a trial *de novo* upon his repayment to the county of the cost of the arbitration proceedings not to exceed fifty per cent of the amount in controversy, but this item is not recoverable even if the appealing party prevails. As appears from a study by the Columbia University Project for Effective Justice reported in the *Harvard Law Review* for January, 1961, there have been 25,242 participations of attorneys as arbitrators in less than two years which, according to the authors' estimate, means that the system has required the services of about seven attorneys for each small claim trial that was spared to the Municipal Court.

Court congestion has been reduced by what amounts to depriving a group of litigants, classified only by the arbitrary dollar figure involved, of contact with the normal administration of justice in American courts. Court congestion has been reduced by calling on lawyers to interrupt activities undertaken for the benefit of their clients and undertake activities for the benefit of the overburdened courts.

It is high time that we faced the fact that the number of our judges must be increased in a measure that has some relation to the increase in the burden that expanded activities and population have placed upon the courts. No amount of "streamlining" the administration of justice and "making it more businesslike" will enable the courts to function with the number of judges that they had twenty years ago. It is still clearer that driving litigants from the courts and drafting the personal and material resources of the profession are but palliatives and should be but temporary ones.

More on Sonic Booms: Litigation Is Showing Their Propensities

The boom in sonic booms continues. What property damage can they do? Can they cause personal injuries? Mr. Hammon, who has written here before on this by-product of the supersonic age, tells us about recent litigation and offers some faintly disquieting observations.

by Stratton Hammon • *of Louisville, Kentucky*

THREE PREVIOUS articles in the *Journal* concerning sonic booms[1] dealt only with the alleged physical facts of this phenomenon or with litigation which was anticipated. The wheels of justice have slowly begun to grind and there are now a few actual cases which can be reported, but first I shall comment on the most recent article in the *Journal*.

In the past I have taken a dim view of the fact that the two services operating the greatest number of jets and causing the most sonic booms, the Air Force and the Navy, have been the very ones who have published scientific rubbish under such descriptions as "present state of scientific data" and "best scientific evidence available". When it is noted that the names of the supposed scientists and the circumstances of the garnering of these "scientific data" are carefully left out of the papers, this omission is conveniently termed "prolix".

Air Force Contentions Not Sustained

Having allowed myself the luxury of a few gently critical remarks, I am rightfully but, in this case, erroneously taken to task in an equally gentle manner by an officer in the Air Force Section of the Judge Advocate General's Department who is also a member of the Bar.[2] I shall not redefine my own technical position in this matter since this was done in detail in two previous articles,[3] but instead let us see how the scientific and legal contentions of the Air Force spokesman compare with evidence introduced in recent case histories, the decisions handed down by the courts and the tests made by other governmental agencies.

In this article by Louis D. Apothaker six items are listed as to what can be expected by the public to happen to their property when a nearby sonic boom occurs. In the first several items it is admitted that damage is possible in the lighter part of a structure such as glass, "loosely latched doors", and the aggravation of existing plaster cracks. It evidently is not even admitted that a sonic boom can damage a well latched door or sound plaster. Item 4 seems to indicate that a low level sonic boom is necessary to cause extensive glass breakage although this is not said in so many words.

Just to clear this point, Technical Note D-48, September, 1959, of the National Aeronautics and Space Administration states: "Cracking of a large plate-glass store window was correlated in time with the overhead passage of a fighter-type airplane at an altitude of 25,000 feet." This plane was flying at only 1.22 Mach. (Mach is the speed of sound.) My own sonic boom experience dictates that one-fourth inch plate glass will withstand much greater pressures than the thinner ordinary window glass and that large panes will generally withstand greater pressures than small ones due to the greater elasticity of the large sheets.

However, I am most concerned with the last two items listed by Mr. Apothaker under the heading, "What damage can be caused by a sonic boom?":

> 5. Structural damage, such as damage to foundations, floors, loaded bearing walls, etc., cannot be caused by a sonic boom.
> 6. Direct physical injury to an individual cannot be caused by a sonic boom.

This may not be passed over as the chance utterance of a legal spokesman unversed in things technical, since it follows exactly the propaganda expounded by other representatives of the Air Force. In October, 1960, Lieutenant Colonel Stanley Butt, Chief of Claims of the Air Force, addressed a committee of the National Association of Insurance Commissioners and, after noting that 327 sonic boom cases were presented to his office in the past fiscal year, went on to reiterate that, "Structural members of a building

1. *Sonic Boom: A New Legal Problem*, by Allen J. Roth, 44 A.B.A.J. 216 (March, 1958); *An Old and a New Legal Problem, Defining "Explosion" and "Sonic Boom"*, by Stratton Hammon, 45 A.B.A.J. 696 (July, 1959); *The Air Force, the Navy and Sonic Boom*, by Louis D. Apothaker, 46 A.B.A.J. 987 (September, 1960).

2. *The Air Force, the Navy and Sonic Boom*, by Louis D. Apothaker, 46 A.B.A.J. 987 (September, 1960).

3. *An Old and a New Legal Problem: Defining "Explosion" and "Sonic Boom"*, by Stratton Hammon, 46 A.B.A.J. 696 (July, 1959); *Sonic Boom Stare Decisis*, by Stratton Hammon, FEDERATION OF INSURANCE COUNSEL QUARTERLY, Vol. 9, No. 4, Summer, 1959.

cannot be damaged by sonic boom" and "Physical injury cannot be caused by sonic boom".[4]

At least a year before the above two items were written (allowing nine months for publishing time) it was known nationwide, especially to the Air Force, that Item 5 was no longer correct. It was also known, and natural laws dictate, that there are *degrees* of sonic booms—all sonic booms are not of the same intensity. A plane traveling at Mach 3 will create a greater sonic boom than the same plane at Mach 1. A plane flying low will create a greater sonic boom on the ground than one flying high, and one flying an erratic course can cause a greater sonic boom, as will be seen later, than one flying a simple straight course. Therefore, with so many known variables affecting the pressures delivered by a sonic boom, it is my point that no one can accurately predict what damage or injuries future sonic booms will or will not cause. This is especially true since the condition of the structure or of the person at the time of the sonic boom must also be taken into consideration. A sorry structure or a sick person will be more easily affected than if both were sound.

Texas Court Finds Structural Damage in First Case

The first case of this sort was *J. E. Alexander* v. *Firemans Insurance Company*,[5] tried in Hamilton County, Texas. A well constructed lumber warehouse two years old, built of metal and frame and containing three carloads of lumber was subjected to a sonic boom and "the force and pressure of such air disturbance, created by the aircraft, unseated the girders beneath the building and capsized it". Here was evidence of direct structural damage by a sonic boom as far back as 1956 sustained twice by an appellate court. Both decisions were unfavorable to the defendant. It is important to note in this case that not only was this telling evidence successfully introduced into the record and twice sustained by the court but the defendant's sonic boom specialist testified that structural damage was a distinct possibility and the court in seeking to mitigate any arbitrary tinge in its judgment noted that "even the insurance company's witness, Parish, admitted that a sonic boom of sufficient intensity can cause structural damage to buildings".

In February of 1959, the United States Court of Appeals for the Tenth Circuit in *F. R. Blair and Pearl Blair* (and some 300 other property owners) v. *U. S.*, 260 F. 2d 237, reversed and remanded a district court judgment against London Lloyds and other foreign insurers in favor of Oklahoma residents whose property was allegedly damaged when the sound barrier was broken at the National Air Show held at Oklahoma City in September, 1956. The court stated that it was never intended nor contemplated that a plaintiff should have the right to join a cause of action against the United States under the Tort Claims Act with an action against third parties under an insurance policy.

We inspected hundreds of these claims and found but one instance of damage which could be connected to a sonic boom. Instead, the damage stemmed from constructional causes, especially the settling of the shallow foundations common to the Southwest under contemporary drought conditions. The one notable exception which I saw was the terminal building at the Will Rogers airfield over which the sonic boom occurred. It lost almost all of its small plate glass windows, but most of the large ones remained intact.

Intact Windows Save "Boom" Defendant

A more interesting case was tried in the district court at Sumpter, South Carolina, in 1959.[6] The evidence brought out that the plaintiff had purchased a well built old house and, after repairing the plaster and painting the natural paneling white, left the house unoccupied for three days. During this time several sonic booms occurred over the house. The fire insurance policy included coverage for damage caused by sonic booms, but disclaimer was made on the basis that the damage was not created by this source and suit followed. We gave negative testimony, that it was impossible for a sonic boom to crack plaster and separate the wood trim on the interior of a building and at the same time leave all the window glass intact. It was explained to the jury how a sonic boom functioned and in what manner damage would have been caused had it stemmed from this source. This was followed by positive testimony, that the claimed damage was attributable to definite constructional causes. Although the case was tried in a small agricultural town in which the plaintiff was well known and the defendant was an out-of-state insurance company, the jury found for the insurance company. The case was carried to the appellate court and the judgment there affirmed.

My Air Force critic stated: "Mr. Hammon would have the courts interpret the word 'explosion' as chemists do rather than the laity. The question involves more than semantics. Its answer must depend on what the parties meant by the use of the word 'explosion' and by what it means in common parlance. . . . the difficult and key step in Mr. Hammon's reasoning is where he defines an 'explosion' to require a chemical or molecular change". A year and a half prior to the publication of this article, under the hand of a very fine trial attorney, we managed to take this "difficult and key step" and did indeed succeed in having the forensic science of a sonic boom accepted by a court which considered only the elementary question as to whether a sonic boom was an explosion.

Is a Sonic Boom "Explosion" Under Insurance Policy?

The incident occurred in Montgomery, Alabama. A contractor was building a control tower at Dannelly Field; he was covered by a fire policy commonly known as "Builder's Risk Completed Value Form Policy", which provided for a "direct loss . . . by explosion. . ." On May 18, 1958, an airplane owned by the United States exceeded the speed of sound and the almost completed tower was structurally damaged. Window glass was broken as usual but here the massive alumi-

4. 43 THE NATIONAL UNDERWRITER 2, October 21, 1960.

5. Texas Civil App., 317 S. W. 2d 752 (1958) and the second, 328 S. W. 2d 350 (1959).

6. A. D. B. Realty Company-Mrs. Alice Boyle-Orient Insurance Company Policy, G-288343; Sonic Boom: January 4, 1958.

num ribs were twisted out of shape and the aluminum spandrels between windows were ripped off, bolts and all. This was not a temporary structure but a well constructed building of reinforced concrete, steel and massive aluminum vertical ribs. A metal building on the field burst apart and collapsed. The aircraft causing this damage passed 500 feet out from the tower and at 500 feet altitude, which placed it about 707 feet in a direct line from the tower. The pilot later stated that he thought he was flying under the speed of sound, but he must have been mistaken for two distinct booms were heard, as is normal. In any case his speed was, at best, just a bit over Mach 1.

The damage was so conclusive that the defendants, several insurance companies,[7] entered into a written stipulation, the principal part of which was that the damage in the amount stated was caused by a "so-called sonic boom" and that the "sole question to be determined by this court is whether or not the phenomenon known as a sonic boom is an explosion". It was also agreed by the parties that the case should be heard by the court without a jury.

The case was tried on January 16, 1959. All witnesses, save one, were specialists. My testimony for the defendants in general followed my article in the *Journal* of July, 1959,[8] with the additional testimony that all true explosions also give off light, gamma rays, and X-rays, but that these are not created by a sonic boom. This trial is given in detail in another article.[9]

In my opinion, the most adroit legal maneuver by the brilliant defendant's counsel was that, after establishing that science does not believe that a sonic boom is an explosion, he dared to contend on the basis of "what it means in common parlance". This passage from his brief will illustrate:

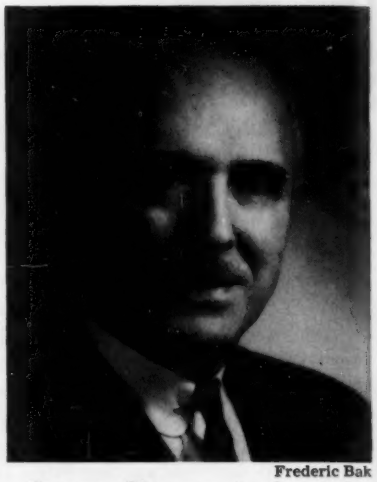
> Mr. Hammon stated that he had examined the standard dictionaries and that the term "sonic boom" was not to be found in any of the standard dictionaries. He stated that he had examined the definitions of an explosion as they appear in standard dictionaries, and . . . was asked the question: "Now, applying *these* definitions, in your opinion, is a sonic boom an explosion?" His answer was "no!" . . .

It turned out that this was most important, for the court was able to digest scientific evidence regarding the sonic boom, about which no legal precedent existed. When, however, the most authoritative scientific evidence ran counter to legal precedent in the realm of explosions, the court to a great extent abandoned scientific fact and decided to go along with precedent. Because of this the turning point of the trial probably was this move to divorce the attributes of a sonic boom from the hackneyed, scientifically impossible explosion cases upon which the plaintiff's counsel necessarily and properly relied so heavily and which evidently impressed the court.

Decision Finds Sonic Boom Is Not "Explosion"

The judge would not hear oral arguments but instructed that briefs be prepared. This delayed the decision and it was not until May 8, 1959, that the court rendered the following decree:

> This day came the parties by their attorneys and issue being joined between the parties on the pleadings and the stipulation of the parties that the sole question for determination by this Court is whether or not the phenomenon known as sonic boom is an explosion within the wording of the policy issued by the defendant to the plaintiff, and after hearing and considering all of the evidence, the Court finds that the phenomenon known as sonic boom is not an explosion within the wording of the policy issued by the defendant to the plaintiff.
>
> The Court is further of the opinion that the term explosion is commonly and ordinarily understood to mean a violent bursting or expansion, following the sudden production of great pressure as in the case of explosives, or a sudden release of pressure as in the rupture of a steam boiler. An explosion occurs when there is an instantaneous release of pressure or an instantaneous elimination of a pressure differential. The succeeding consequences of an explosion may be a blast wave and other effects of greater or lesser magnitude, such as thermal radiation, light, sound, flying fragments, etc., initiated by the explosion.
>
> The Court is further of the opinion that "sonic boom" is a new term which has not acquired a fixed meaning in the minds of the general public. It was comparatively recently employed by men engaged in aeronautics to describe a phenomenon of supersonic flight. Below the speed of sound in air, which is about 760 miles per hour under standard atmospheric conditions, an object moves through the air without causing unusual disturbances. Air is elastic, and at supersonic speeds the air particles in the path of a moving object are easily pushed aside. As the speed of sound is approached conditions leading to the development of sonic boom build up. At and above sonic speed, air particles are not as easily pushed aside, and as they accumulate in front of and around a moving object pressure changes or pressure waves are continuously produced which gradually culminate in continuous shock waves. Energy is released along these shock waves and as this occurs a distinct sound may be



Frederic Bak

Stratton Hammon is the senior partner of the vibration damage specialists of Louisville. He received training from the Army's Corps of Engineers in explosives, and obtained a great deal of experience in Europe during World War II in the effect of explosives upon structures. He writes from more than thirty years' experience as an engineer.

7. The Fidelity & Guaranty Insurance Underwriters, Inc., the Liverpool and London and Globe Insurance Co., Ltd., and the Citizens Insurance Co. of New Jersey.

8. Hammon, *An Old and New Problem, Defining "Explosion" and "Sonic Boom"*, 45 A.B.A.J. 696.

9. Hammon, *Sonic Boom Stare Decisis*, Federation of Insurance Counsel Quarterly, Vol. 9, No. 4, Summer, 1959.

heard. This sound is called a "sonic boom".

The Court accordingly is of the opinion that judgment should be rendered in favor of the defendant. It is therefore.

CONSIDERED, ORDERED AND ADJUDGED by the Court, and it is the judgment of the Court, that judgment be and the same is hereby rendered in favor of the defendant.

As far as sonic booms were concerned, the judgment was very good, but the court erred in its definition of explosions. The ambiguous, self-contradictory and definition-defeating items defining an explosion have been previously discussed.[10] The plaintiff appealed to the appellate court but meanwhile the appellant instituted an action against the United States under the Federal Tort Claims Act to recover the same damage sought in the Circuit Court. The action against the Government resulted in a settlement and payment by the Government to the contractor of $2,222.55, which represented the entire damage caused by the sonic boom. The defendant filed a motion that the appeal not be dismissed for several reasons, one of which was the broad public interest involved, but the court decided that the recovery from the United States rendered the appeal moot. By paying this claim for structural damage to a building, the Government admitted that such damage was not only possible but actual.

Public Statements Concede Widespread Damage

Now let us consider public utterances of responsible people on whether a sonic boom can cause structural damage. The *New York Herald Tribune* reported on April 8, 1959:

> A double sonic boom so powerful that it caused more damage than a recent strong earthquake jolted the San Francisco Bay area today [April 7, 1959]. Thousands of frightened residents thought it was another earthquake or a violent explosion. Tall buildings shook, scores of windows were shattered and plaster fell or cracked in a 75-mile strip that included San Francisco and the peninsula cities to the south. A sprinkler system blew up at Alameda Naval Air Station at the moment of the boom, 10 A.M.

The *New York Herald Tribune* of April 14, 1959, quoted General Curtis LeMay in part:

> The sonic boom from faster-than-sound aircraft leave shattered glass and irate owners along paths sometimes 100 miles wide. . . . On a secret flight of the V-58 Hustler bomber from Seattle to Chicago late last year, the four jet nuclear bombers left a trail of shattered windows over their entire course. Despite the Air Force wish to keep the flight secret, non-military observers were said to be able to plot the glass damage on the ground from newspaper reports, and then determine the course and probable speed of the plane over its entire route.

In the *Saturday Evening Post* of December 4, 1954, Corey Ford stated in an article:

> As the YF passed directly overhead [Palmdale, California, 1953], the compressive punch of the shock wave disintegrated six large windows and twenty-seven smaller ones, scattering glass throughout the hall and cracking the 4″ x 4″ wooden beams supporting the door frames.

Tests Show Sonic Booms Not All the Same

Tests by government agencies have established that a low-level sonic boom is more damaging than those occurring at high altitudes, that faster speeds increase the intensity of sonic booms and that flying on other than a straight course may produce super-booms. The shape of the flying object also has an effect on the nature of the pressure wave or sonic boom created.[11]

In 1959 a series of tests was conducted by the Government in which the aircraft flew at altitudes down to 30,000 feet at Mach speeds up to 2.1. The worst results were "objectionable" sonic booms having a top pressure of 1.51 pounds per square foot.[12] The British, in tests to determine the "pressure jumps produced by an aircraft in steady level flight", registered three-tenths pound per square foot from planes flying at 60,000 feet and 20 pounds per square foot from planes in level flight near the surface flying at only 1.1 Mach.[13]

The National Aeronautics and Space Administration states that 30 pounds per square foot will produce definite damage to small windows[14] but tests by the United States Bureau of Mines resulted in this conclusion: "Positive damage was obtained on the window boxes when the maximum pressure reached 1.5 pounds per square *inch*",[15] or 216 pounds per square foot. The wide difference between 30 and 216 pounds per square foot may have resulted because the first was from direct sonic boom damage and the second from blasting damage—which could mean that a sonic boom can damage with less pressure than pressure created by blasting.

In any case the Air Force Flight Test Center created pressures of 60 pounds per square foot in very low flight at Mach 1.05 (TN-56-20). An attempt was made to record a shallow high Mach number dive but "the static pressure change during the dive *forced the recording traces off scale*". Our Government also has proved that sonic boom overpressure will increase with the speed of the planes but not in direct proportion to the Mach multiplication. They obtained 26 per cent increase in pressure between Mach 1.5 and 3.0.[16] What happens then when the prediction of Elwood R. Quesada, Administrator of the Federal Aviation Agency, comes true? He said that "supersonic transport at three and a half times the speed of sound will be accepted in the next decade as the jet is now".[17]

Manner of Plane's Flight Affects Sonic Boom

There are still further complications. D. G. Randall in his "Methods

10. *Ibid.*

11. National Aeronautics and Space Administration Technical Note D-161, December, 1959.

12. National Aeronautics and Space Administration Technical Note D-235, March, 1960.

13. Aeronautical Research Council Reports and Memoranda, R & M No. 3113 (14,756) A. R. C. Technical Report. *Methods of Estimating Distributions and Intensities of Sonic Bangs*, by D. G. Randall B. Sc., Her Majesty's Stationery Office, 1959.

14. National Aeronautics and Space Administration Memo 3-4-59L, April, 1959.

15. U. S. Bureau of Mines, R. I. 3622, *Damage from Air Blast*, by S. L. Windes, February, 1942.

16. National Aeronautics and Space Administration, Technical Note D-235, March, 1960.

17. Speech before the executives of the Chamber of Commerce at Louisville, Kentucky, October 12, 1960, reported in the COURIER JOURNAL, Louisville, Section 2, page 1, October 13, 1960.

for Estimating Distributions and Intensities of Sonic Bangs"[18] states:

> When the aircraft is not moving in the extremely simple manner of above example (straight line parallel to earth), the resulting patterns of curves (pressure waves) become more complex. In accelerated flight some regions on the ground may be covered more than once by the curves connecting points at which the bangs are received at the same time, so that in these regions multiple bangs are received. . . . Since the bangs received on and near such lines are more intense than those elsewhere in the locality they are called "super-bangs".

This is supported by the calculations of P. Sambasiva Roa.[19]

If a plane flying at 1 Mach on a straight level course 707 feet away from the control tower at Montgomery, Alabama, was able to cause definite structural damage, then a plane flying at Quesada's 3½ Mach on Randall's accelerated course the same distance away could be reasonably expected to create roughly 150 per cent more damage.

Personal Injury Is Possible, Even Probable, in "Boom"

Under these conditions personal injury is not only possible but probable. T. H. Kerr, testing in England with flights of only 1.47 Mach,[20] found that:

> The loud bangs were similar in sound to close gunfire; a distinct pressure was felt on the chest and the ears were left momentarily singing and there was a distinct impression that the ground shook. Even though the arrival of the bangs was expected within a second or so, the occurrence of the high intensity bangs was still startling.

Supposing I am correct and the force of a future sonic boom imparted to a structure cannot be foretold with any degree of accuracy, we are not, however, as helpless as Mr. Apothaker seems to think when he says: "If your house is directly underneath one, you would have a great difficulty in distinguishing the pressure waves from a sonic boom that breaks your window panes from the very similar pressure waves of the dynamite blast that do the same thing." The two pressure waves are not "very similar". It is possible to distinguish with a high degree of accuracy not only between damage inflicted by concussion from sonic booms and dynamite detonations but even between various types of explosions such as dynamite, natural gas, LP gas, gasoline, various chemicals, etc. All have their individual characteristics.

18. Aeronautical Research Co. ..ll Reports and Memoranda, R & M No. 3113 (14.756) A. R. C. Technical Report, Her Majesty's Stationery Office, 1959.

19. *Supersonic Bangs*, by P. Sambasiva Roa, Department of Mathematics, the University of Manchester, England, also Aeronautical Research Council 17427 FM 2194, March 2, 1955. Also see, *Flow Pattern of a Supersonic Projectile*, by Whitman, COMMUNICATIONS ON PURE AND APPLIED MATHEMATICS, Vol. V, No. 3, August, 1952.

20. Royal Aircraft Establishment (Bedford), Technical Note No: Aero. 2642, *Experience of Supersonic Flying Over Land in the United Kingdom*, by T. H. Kerr, August, 1959.

United States Statutes at Large, Tables of Laws Affected in Volumes 70-74—a Recent Government Publication

The General Services Administration has announced the publication of the first five-year cumulation of tables designed to enable users of the United States Statutes at Large to find the relation between new and old federal laws without time-consuming research. The tables were compiled by the Office of the Federal Register of the General Services Administration's National Archives and Records Service.

The publication, entitled *United States Statutes at Large, Tables of Laws Affected in Volumes 70-74*, lists all prior laws and other federal instruments that were amended, repealed or otherwise plainly affected by the provisions of public laws enacted during the years 1956-60.

The tables contain about 11,000 references to provisions of prior laws and other federal instruments. The largest number of references to a single act—the Social Security Act—is about 500. Some laws enacted during the years 1956-60 had an effect on general legislation passed as early as 1792 and on treaties dating back to 1819. Included is an index by popular name of the acts affected.

This new publication is for sale by the Superintendent of Documents, Government Printing Office, Washington 25, D. C., at $1.50.

Philadelphia's Municipal Court Eliminates Backlogs

Mr. Zal explains how the problem of backlogs has been practically eliminated in the Philadelphia Municipal Court under the compulsory arbitration plan which was put into effect in 1958. Admittedly the plan has not gone entirely smooth, he writes, but the diligence and co-operation of the Bench and Bar have made it highly successful.

by **Frank Zal** • *Arbitration Commissioner of the Municipal Court of Philadelphia*

IN THE LAST ten or fifteen years, there has been a great deal of criticism directed at the administration of justice because of the constant mounting of court backlogs. We have been told over and over again that our courts are being operated in an outmoded and unbusinesslike fashion and that the administration of some courts is being operated like a corner grocery store in a supermarket area. Just recently, Chief Justice Earl Warren commented that the federal district courts are so far behind in their work that the way they are going now, it would take them sixteen years just to clean up the backlog. He also indicated that pending cases in the district courts number more than 71,000. Many court reforms have been suggested, but it appears that to date, Philadelphia, Pennsylvania, is the only large city which has taken definite and concrete action, and it has obtained real results.

By the diligent efforts of the Philadelphia Bar Association, under the leadership of Walter E. Alessandroni, who was Chancellor at that time, and the co-operation of the Municipal Court judges of Philadelphia, the Pennsylvania Legislature passed the Act of June 20, 1957, P.L. 336, extending compulsory arbitration to the Municipal Court of Philadelphia. In accordance with the provisions of this act, we now have the following rule in the Municipal Court of Philadelphia:

> All cases, which are now or later at issue, when the amount in controversy (exclusive of interest and costs) shall be two thousand dollars ($2000.00) or less, except those involving title to real estate or actions in equity, or assessments of damages after judgments entered, shall be submitted and heard and decided by a Board of Arbitrators, consisting of three (3) members of the Bar of Philadelphia County, to be selected as hereinafter provided in Rule II.

On February 17, 1958, the plan was inaugurated in Philadelphia. Two thousand five hundred lawyers of the Philadelphia Bar volunteered to serve, including some of the most prominent, able and high priced lawyers in Philadelphia. Compulsory arbitration was a success from the very beginning, and it was a factor in winning for the Philadelphia Bar Association the American Bar Association's Award of Merit for 1958 for the outstanding program among bar associations in cities of more than 100,000. It also figured in the Annual Award for 1958 of the Pennsylvania Bar Association. All of this did not happen by accident; it was the result of diligent work by members of the Bar who patiently gave of themselves and their time to serve as chairmen and as members of arbitration panels, and of course, assisted as counsel for litigants. A great deal of credit should go to the judges of the Municipal Court who enthusiastically, and with a great deal of devotion, worked long hours in order to promulgate the rules governing arbitration. Nor can we overlook the assistance given by the Philadelphia City Council which, from the very beginning of arbitration, was most sympathetic to the institution of the system, and allocated the sum of $250,000 for 1958, and annually thereafter continued to appropriate the necessary funds to make possible the continuance of compulsory arbitration in Philadelphia. We also have a special bar association committee which, from the very beginning, has been working diligently with the court and the Bar to facilitate the operation of the arbitration machinery. This committee bore the brunt of drafting regulations for the participation of the members, and it worked with the judges on the rules of court. Every letter, inquiry or complaint was answered promptly and fully, and there were many. The committee's availability on every problem, no matter how small, went a long way toward establishing a better understanding of the program's objectives and making it function smoothly. We also, of course, have a hard working and dedicated staff in the office.

Everybody agrees that the new system has reduced drastically the processing time for cases of $2,000 or under, has brought greater flexibility to the scheduling of such cases and has spurred many litigants to settle their cases privately. As a result of the

institution of compulsory arbitration in the Municipal Court, and raising that court's jurisdiction to include cases involving up to $5,000, the backlog of cases in the Common Pleas courts also has been reduced. Of course, the clearing of the trial jam in the Municipal Court itself has made it possible to dispose of cases much faster in the category of $2,000 to $5,000 which are still being tried with or without juries, depending on the choice made by the attorneys for the litigants.

Plan Creates Good Will

As a result of the smooth operation of compulsory arbitration, not only has time and money been saved by eliminating expensive jury trials, but it has also created a lot of good will among citizens who formerly had to wait a number of years to dispose of a single case. It is obvious, of course, that with the availability of 2,500 lawyers to act as panel members, and the use of the private offices of panel members in lieu of courtrooms, there has also been a great deal of saving. Instead of being limited to a handful of judges and a handful of courtrooms, the City of Philadelphia is now literally a huge courtroom with unlimited space, unlimited facilities and unlimited manpower to sit as arbitrators. The public, of course, is realizing the fact that not only is every litigant getting due process, but also a speedy trial. Furthermore, lawyers who sit as arbitrators have an unprecedented opportunity to establish in the minds of the litigants and their witnesses a favorable impression of the law and the legal profession, and to dispel some of the adverse impressions which too many of the public seem to have. It also, of course, has given lawyers a new insight into the problems that confront a judge, and lawyers are now more co-operative. As evidence of that, I point to Rule V of the Rules for Arbitration, which provides, "any case requiring hearing of unusual duration or involving questions of unusual complexity, the Motion Judge, on petition of the members of the Board and for cause shown, may allow additional compensation"; even though arbitrators have tried many long and complex cases, only a mere handful have requested additional compensation.

To date, practically the entire Philadelphia Bar and city officials have expressed complete satisfaction with compulsory arbitration in the Municipal Court. David Berger, City Solicitor, pointed out that of the first 250 cases which the City of Philadelphia tried before arbitration panels, there were only three appeals, and that of course also illustrates the fairness of the panels. It is a well-known fact that justice delayed is justice denied, and no matter how fair a decision may be, it cannot be truly appreciated by the public when it comes several years after suit has been started. By the proper operation of compulsory arbitration in Philadelphia, such delays have now been eliminated in the Municipal Court.

We recognize that we are not operating in Utopia and, naturally, there has been some criticism, but I can honestly say that it has been very minute. Thus, on April 17, 1958, we received the following letter from a lawyer of a large firm, but he, of course, was only speaking for himself and not for his firm, because many members of his firm are still participating in panels:

> Please be advised that the first two cases set forth above have been settled. The third case, which was scheduled for hearing today, has been postponed by agreement of counsel. I am returning the papers in all the cases to the Prothonotary's Office, and I would ask that you remove my name from the list of arbitrators. I have had seven cases listed before me and I am no longer willing to be imposed upon to arrange hearings, write innumerable letters and set aside time for the convenience of the Arbitration Commission or the Courts.

A Few Rough Spots

No doubt there have been instances where cases have been settled weeks in advance of hearings, and either no notice or only last minute notice was given to the arbitrators handling such cases. This, of course, has been due to a lack of consideration, which we are constantly trying to eliminate, by a few members of the Bar. Certain rough spots are also bound to be encountered with every innovation. It has happened that chairmen of panels had to be assigned as many as nine or ten cases before completing their required three, and they have expressed concern and mild irritation over this problem, particularly since they had arranged hearings, sent out notices and even met at the designated time, only to find at the last minute that the case had been settled or that a request was being made for a continuance. A good many of these irritations could have been avoided if counsel for litigants had been a little bit more considerate and had advised the chairmen of panels of the disposition of the case before the zero hour. Some mild criticism has also been levelled at us because of the fact that every lawyer is eligible to participate, including lawyers who have been recently admitted to the Bar. However, with 2,500 lawyers, the average must certainly be a good one. The same problem can be raised with jury panels. It also has been stated that as a result of the speedy processing, more claims are being brought. Actually, this is not so, but even if it were so, why should a litigant, literally speaking, be talked out of bringing suit in a case because he becomes disgusted at the length of time that it takes to dispose of the case? Furthermore, the mere bringing of a suit does not mean that the litigant is going to win his case.

We also point with pride to the favorable reaction that we have noted in the various Philadelphia newspapers. On February 19, 1959, the *Philadelphia Evening Bulletin*, which "nearly everybody reads", had the following editorial:

> Look, No Backlog! The often belabored Municipal Court is entitled to take a bow finally. It stands in the vanguard of judicial efficiency. . . . Someone estimated that it would have taken a Judge sixty years to dispose of the number of cases handled through arbitration in just one year. More practically, that would be the whole work of three Judges serving what might be lifetimes on the Bench. Those who have despaired of justice lagging in hopeless backlogs, and those who have called for more and more courts

as the only way out, have something to ponder in this one year record. Surely the technique can be applied to many other areas of the pettifogging litigation which crams the cities' tribunals. The Municipal Court will be happy to show how it is done.

On July 7, 1959, the *Philadelphia Inquirer*, in an editorial discussing arbitration, said:

> The results have been impressive. Litigants with limited financial resources are no longer compelled to wait for months to have their claims disposed of, and the Municipal Court Judges are relieved of a great deal of unnecessary work. . . . Judge Bonnelly wants the system expanded by raising the figure where compulsory arbitration is mandatory. The plan should work out just as satisfactorily with larger claims as with smaller ones.

As a matter of fact, Adrian Bonnelly, the President Judge of the Municipal Court, was quoted as follows at that time:

> It is a God-send to the little businessman and people of limited financial resources. They can now have their legal problems straightened out and terminated within a 90-day period.

He also stated that this was the first time in the history of the Municipal Court that civil actions were being handled on a current basis. It is also gratifying to note that as we are about to complete three and a half years of operation, we can report that during the past forty-two months, we have processed approximately 24,000 cases. The last detailed report which was prepared as of December 31, 1960, showed that panels had processed 17,267 cases since February 17, 1958, an analysis of which is shown in Table I.

To date, we have submitted six statistical reports, the recapitulations of which are shown in Table II.

An attempt was also made to determine the periodic processing of the cases, and the rate at which they were finally disposed of by the panels, and this analysis was based on the first 3,000 cases. The status of these same first 3,000 cases was analyzed periodically on the dates indicated. The results are shown in Table III.

It is interesting to note that of the original 2,264 cases which were analyzed during our first statistical report, only seventy cases are still outstanding for reasons indicated in Table IV.

It might also be of interest that while on February 17, 1958, the approximate waiting period for a case to get to trial was twenty-four to thirty months, now it is only about five months. Of the original backlog cases for which trial orders had been on file, there were approximately 2,400 cases in which suits had been started between 1932 and 1955, as illustrated by Table V.

Practically all of these cases have now been cleaned up. It is worthwhile noting that compulsory arbitration definitely did not increase litigation, as is evidenced by the following figures: In addition to the original backlog of 7,102 cases, lawyers filed 5,522 trial

Table I
Recapitulation of Cases Processed

Total Number of Findings (Reports and Awards)	9,668
Cases Settled During Arbitration	1,056
Cases Pending Before Panels	26
Cases Settled and Disc. and Misc. Dispositions	6,008
Deferred and Continued Cases	389
Hold Cases	120
Total Cases *Processed* from February 17, 1958, to December 31, 1960	17,267
Unassigned Cases	5,408
Total Cases Referred to Arbitration	22,675

Table II

	May 9, 1958	Aug. 15 1958	Dec. 31, 1958	June 30, 1959	Dec. 31, 1959	Dec. 31, 1960
Reports and Awards	611	2,077	3,343	6,831	8,414	10,723
Settled and Disc.	581	1,615	2,197	3,578	4,196	5,066
Misc. Dispositions	39	115	200	462	697	942
Deferred Cases	47	40	60	119	163	123
Continued Cases	207	590	802	983	703	266
Hold Cases	0	96	125	268	201	120
Pending Cases	779	833	780	1,060	323	27
Cases Processed Periodically from February 17, 1958	2,264	5,366	7,507	13,301	14,697	17,267
Cases Not Processed						5,408
Total Referred to Arbitration						22,675

Table III

	Aug. 18, 1958	Dec. 31, 1958	June 30, 1959	Dec. 31, 1959
Reports and awards	1,416	1,478	1,647	1,720
Settled and discontinued cases	974	987	1,070	1,085
Miscellaneous dispositions	73	63	77	97
Deferred cases	14	14	19	32
Continued cases	374	368	113	13
Hold cases	44	52	58	44
Pending cases	105	38	16	9
Total	3,000	3,000	3,000	3,000

Frank Zal was graduated from the Wharton School of Finance and Commerce, and the University of Pennsylvania Law School. He has been practicing law since 1936. In 1958, he was appointed the first Arbitration Commissioner for the Municipal Court of Philadelphia.

Table IV

Cases Still Outstanding from Original Backlog of 2,264 Cases	
Cases deferred for military reasons	24
Continued cases	8
Cases held up at request of counsel	32
Cases pending before panels	6
Total	70

Table V

Number of Old Cases Between 1932 and 1955 for Which Trial Orders Had Been Filed			
1932	1 case	1948	7 cases
1936	1 case	1949	13 cases
1942	1 case	1950	61 cases
1943	1 case	1951	76 cases
1945	1 case	1952	162 cases
1946	2 cases	1953	300 cases
1947	10 cases	1954	566 cases
		1955	1,200 cases*

*Approximate

orders during the first twelve months of arbitration, and for the full year of 1959, there were submitted trial orders in 5,635 cases. During November of 1959, an analysis was also made of the reports and awards filed which at that time totaled 7,578 cases, and of that number there were 4,536 findings in favor of plaintiffs, and the remaining 3,042 cases had either been settled during arbitration, or the findings were for the defendants.

Of the cases in which there were findings for the plaintiff, the categories were as follows: Up to $100—691 cases; from $101 to $500—2,811 cases; from $501 to $1,000—777 cases; from $1,001 to $1,500—172 cases; from $1,501 to $2,000—85 cases. Of the first 6,000 cases in compulsory arbitration, the survey showed that the average award paid to 1,992 plaintiffs was $348.15.

A statistical word as to the human element. While the responsibilities of the Arbitration Commissioner have been many because of the great detail involved in handling approximately 2,500 arbitrators, the work has also been most gratifying, due to the wonderful co-operation exhibited by the judiciary and the members of the entire Bar. I am particularly grateful to Hazel H. Brown, who was President Judge when the details of the plan were formulated and who gave unstintingly of her time and personal interest so that a staff and office facilities were quickly assembled. The original Rules of Arbitration prepared by the court committee, consisting of Francis F. Burch, Chairman; Felix Piekarski and Victor J. DiNubile, have held up very firmly. A great deal of credit should go to the Judges of the Municipal Court who, enthusiastically, and with devotion, worked long hours in order to promulgate the rules governing arbitration. Likewise, the Bar Association Committee, of which Sylvan M. Cohen has been Chairman from the very beginning, has done a magnificent job in preparing the instructions to the Bar, and in handling the task of answering numerous letters and inquiries received during the past twenty-four months. Last, but not least, each eligible attorney who has been available for arbitration assignments since February, 1958, has to date participated in four complete rounds. The first round of assignments was completed on June 11, 1958; the second round was completed on January 6, 1959; the third round on April 23, 1959; and the fourth round on October 30, 1959. The fifth round began on January 4, 1960, and was completed January 23, 1961; and the sixth round began on May 17, 1961.

It is also most gratifying to note that when the Report of December 31, 1959, was submitted to Adrian Bonnelly, President Judge of the Municipal Court, he remarked, "The report is of such moment that it is my conviction the entire Bar, not only of Philadelphia but of Pennsylvania, should know and appreciate this marvelous work."

Finally, on January 19, 1960, when a reception was given to Vincent P. McDevitt, the new Chancellor of the Philadelphia Bar Association, he reviewed the services rendered by members of the Bar to the public at large, remarking as follows:

> We have already indicated our concern over the need for greater respect for law, and have shown both our willingness and our ability to act in the matter. And this in a manner which has attracted the attention of the entire country. I speak, of course, of the bold plan for compulsory arbitration in the Municipal Court of Philadelphia which has succeeded in removing a tremendous backlog of cases. The tangible results of such progressive action by the bar association are readily measured by the number of cases disposed of. The intangible results, namely a greater public confidence in our legal processes resulting from the more timely administration of justice, although less easily measured, are no less real and of far greater importance.

The South Amboy Explosion Cases

On May 19, 1950, twelve carloads of mines and other high explosives were accidentally set off in South Amboy, New Jersey, resulting in the death of thirty-one stevedores and millions of dollars worth of property damage. Following the explosion, 186 separate lawsuits were filed in nine courts in four different states. The lawsuits involved over 8,000 plaintiffs and thirty defendants, including the United States. Mr. Carpenter explains how this complex legal snarl was finally settled without trial.

by James D. Carpenter • ***of the New Jersey Bar (Newark)***

WITH COMPLAINTS coming from all sections that court calendars are crowded with an increasing number of cases, it is indeed refreshing to note that on November 25, 1959, Judge Phillip Forman in the District Court of the United States at Trenton, New Jersey, in one sitting, terminated 186 separate suits that had been pending for approximately nine years in nine different courts in four different states—New York, New Jersey, Maryland and Ohio—and the District of Columbia, involving over 8,000 plaintiffs against the United States of America, five interstate railroad companies, seven other corporations, and seventeen individual defendants.

These actions all arose out of the terrific explosion of antitank mines and dynamite in South Amboy, New Jersey, at 7:28 P.M. on May 19, 1950, while the explosives were being transferred from railroad cars on a South Amboy pier to lighters which were to take the explosives to the SS *Flying Clipper*, which was anchored in New York harbor and which in turn was to carry the explosives to Pakistan. Thirty-one officers and employees of James Healing Co., stevedores, engaged in transferring the explosives from the railroad cars to the lighters, were instantly killed; four lighters, two loaded and two partially loaded, a number of freight cars, and the "Powder Pier" of The Pennsylvania Railroad Company were completely destroyed; 250 persons in the City of St. Amboy suffered personal injuries; and some 8,000 properties in and near South Amboy were more or less damaged. Severe damage was sustained by churches, schools, public buildings, nearby manufacturing plants and private residences.

Shortly after the explosion, investigations into its cause were instituted by both the United States Coast Guard and the Committee on Merchant Marine and Fisheries of the House of Representatives. These investigations developed the fact that prior to May 14, 1950, The Kilgore Manufacturing Company of Westerville and Newark, Ohio, manufactured, under contract with the Government of Pakistan, a large quantity of antitank and antipersonnel mines, detonators and fuses. These contained high explosives, TNT in the mines, tetryl and lead azide in the fuses and detonators. These explosives are classified by both the Interstate Commerce Commission and the Coast Guard as Class A explosives. The Government of Pakistan had engaged the services of National Carloading Corporation to expedite the shipment of these articles from the Kilgore factories in Ohio to Karachi, Pakistan, and National Carloading Corporation engaged space on the SS *Flying Clipper*, owned by Isbrandtsen Company, Inc., which was expected to sail May 18, 1950, to carry from the Port of New York to the Port of Karachi 8,000 cases of antitank mines and 1,000 cases of antipersonnel mines.

For thirty years prior to the explosion, The Pennsylvania Railroad Company had operated on the Raritan River at South Amboy, within the confines of the Port of New York, certain piers, one of which was known as the "Powder Pier", which was the only pier in the entire Port of New York from which commercial shipments of explosives were permitted to be unloaded from freight cars.

Coast Guard Directive Limits Shipment of Explosives

On May 8, 1950, Rear Admiral E. H. Smith, Commanding Officer of the Third United States Coast Guard District, charged with the supervision of the movement and shipment of explosives in the district, issued a directive:

> Due to the hazardous conditions which are deemed to exist in connection with explosives loading in Gravesend Bay and at South Amboy, N. J., the Commander, Third Coast Guard District has found it necessary to put into effect certain limitations with regard to Class A explosives.
>
> In accordance, therefore, with a directive from the Commander, Third Coast Guard District, effective this date, no permit will be granted by the

Captain of the Port, New York, for any vessel to load or discharge Class A explosives in an amount in excess of 125,000 pounds in Anchorage 49-C, Gravesend Bay, and no permits will be granted for the loading or discharging of any amount of Class A explosives at South Amboy, N. J.

The Class A explosives referred to above are those defined as such in the booklet "Explosives or Other Dangerous Articles on Board Vessels" promulgated by the Commandant, U. S. Coast Guard, pursuant to 46 U.S.C. 170.

Class A explosives in amounts not exceeding 500 pounds may be handled, loaded, discharged, or transported without a permit from the Captain of the Port, subject to Federal, State, and local laws and regulations.

This directive was published, and all of the corporations involved in the explosion in any way received notice thereof. There were facilities at Artificial Island, below Wilmington in the Delaware River, for the loading of explosives and other dangerous articles.

On May 5 and 9, 1950, Kilgore, at the instance of National Carloading, requested the Baltimore and Ohio Railroad Company to place five cars at Vanatta, Ohio, for loading explosives, and on May 10 and 12, ten freight cars were selected, approved and certified at Vanatta for the transportation of the explosives.

On May 11, the James Healing Co., stevedores, which was engaged by National Carloading to receive the shipment and transport it by lighter or barge for loading on the SS *Flying Clipper*, applied to the Commandant of the Navy Depot at Earle, New Jersey, for permission to allow the shipment of explosives to go to the SS *Flying Clipper* through the facilities of the United States Navy at Earle, New Jersey, but this request was denied on May 13.

On May 13, at the instance of National Carloading, Kilgore presented to the Baltimore and Ohio Railroad shipping orders and bills of lading, as directed by National Carloading, for seven cars consigned to James Healing Co., % United States Navy, Earle, New Jersey, for loading on the SS *Flying Clipper*, and seven cars were started over the lines of the Baltimore and Ohio at about 10:00 P.M. that day. On May 14, Kilgore turned over three more cars loaded with mines and explosives to the Baltimore and Ohio, intended for the same consignee and routed over the same route. These started toward their destination on May 15.

Both National Carloading and Kilgore knew when the bills of lading were in preparation that no permission had been granted by the Navy to receive the ten carloads of ammunition at Earle for loading on the SS *Flying Clipper*, and it was alleged that the bills of lading were prepared and the explosives were started in interstate commerce with the intention of diverting them in transit to some other destination for transportation to the steamship in the event the Navy did not permit the cars to pass through its facilities at Earle.

On May 15, National Carloading sent a letter to Rear Admiral Smith in which it was represented that the manufacturer of the explosive mines "was ordered to route the cars here [to New York] and to defer their movement until yesterday [May 14], the latest possible date, to connect with this vessel", which was represented as leaving New York on May 18. The letter further stated:

> Through a misunderstanding, some of the cars were shipped earlier and may be in New York by tomorrow [May 16].
>
> As the Leonardo [Earle] facilities are definitely unavailable for commercial shipments, we respectfully request that in view of the shortness of time and the natural desire of our government to assist a friendly government, you permit this one shipment to be treated as an "emergency" shipment and allow it to move through the facilities heretofore considered satisfactory.

It was charged that National Carloading Corporation and Isbrandtsen Company, Inc., owners of the steamship, both communicated with officers of the Coast Guard making the same false statements contained in this letter, and urging a speedy decision, upon representation that the cars loaded with explosives were in the New York area and constituted a menace to the inhabitants thereof, when none of the cars was in fact closer to New York than Harrisburg, Pennsylvania.

Coast Guard Agrees To Allow the Shipment

On May 16, Isbrandtsen Company communicated with the Coast Guard requesting immediate action on National Carloading's request, but the Acting Commandant declined to overrule the directive of Rear Admiral Smith's May 8 directive. Admiral Smith was ill at home. Thereupon an appeal by telephone was made to Coast Guard Headquarters in Washington, which was advised that the cars containing explosives were in the New York area and constituted a hazard. The Coast Guard officials in Washington, at the end of a telephone conversation, without any inquiry or investigation, directed Captain Stinchcomb, Captain of the Port of New York, to issue permits for this one shipment to go through the facilities at South Amboy.

Promptly, on May 16, Captain Stinchcomb by telephone advised The Pennsylvania Railroad Company, owner of the pier at South Amboy, and others that the Coast Guard would issue permits for the loading on lighters at South Amboy of the ten carloads of antitank and antipersonnel mines, as well as 1,800 cases of dynamite in two carloads, manufactured by Hercules Powder Company, for shipment to Afghanistan via the SS *Flying Clipper*. Likewise on May 16, National Carloading and Isbrandtsen requested the Pennsylvania to accept delivery from the Reading Company at Harrisburg of the ten cars of explosives that had been shipped from Kilgore in Ohio, and to accept from Hercules Powder Company two carloads of dynamite, pursuant to permission that had been granted by the United States Coast Guard, for transshipment to the SS *Flying Clipper*.

The Pennsylvania communicated with Captain Stinchcomb, Captain of the Port, who advised it that he would approve acceptance of the cars for delivery to South Amboy for transfer by water to the SS *Flying Clipper*, and that immediately thereafter the Coast Guard directive of May 8, would again become effective.

All of the ten cars containing antitank mines and antipersonnel mines, and the two cars of dynamite arrived

at South Amboy on May 19. At approximately noon of that day two of the lighters of the Healing Company had been fully loaded with 1,800 cases of dynamite and 1,000 cases of antipersonnel mines and were moved to the end of the pier and made fast there, while the remainder of the cars were being unloaded into two other lighters. A Coast Guard official was on the Powder Pier during most of the day while the unloading progressed, and he directed the Healing Company to move the lighters out into the Harbor as soon as they had been moved to the end of the pier at noon. This order was not obeyed. It was while the last two cars of mines were being unloaded that a violent explosion occurred at 7:28 P.M. and the entire shipment, the lighters, the pier and the cars thereon were totally destroyed.

The Lawsuits Begin

James Healing Co. promptly filed a petition on the admiralty side of the District Court of the United States for the District of New Jersey to limit its liability to the value of the vessels and pending freight, and it secured an order entitling all claimants to file their claims in that proceeding. The order enjoined any further actions against this company.

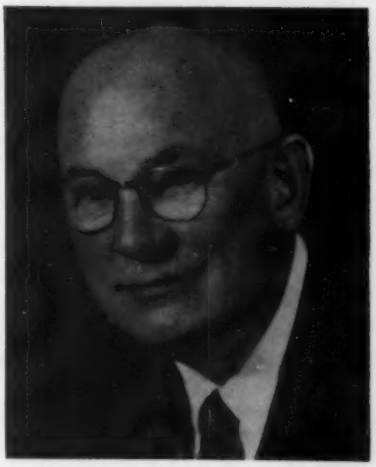
This admiralty action was followed by a number of personal injury and death actions against The Pennsylvania Railroad Company, the National Carloading Corporation, The Baltimore and Ohio Railroad Company, and others in both the Superior Court of the State of New Jersey and the United States District Court for the District of New Jersey. The Pennsylvania Railroad filed two actions in the United States District Court, one against the United States and the other corporate defendants to recover the damages which it had suffered in the explosion, and also for indemnity in case any judgment might be rendered against it. The second action which it filed was against the United States, the other corporate defendants and seven claimants that had brought suit against it for damages. In this action, the Pennsylvania prayed for an order enjoining and restraining the prosecution until the final determination of the action, of all actions for damages sustained by any person or persons as a result of the explosion, against the plaintiff or any of the parties to the action other than the defendant Kilgore Manufacturing Company, unless it should appear therein; and for judgment declaring the rights and other legal relations of the parties to this suit, as well as all persons, firms and corporations who suffered damages as a result of the explosion, as between themselves and each other, whether any one or more of the parties to this action were guilty of wanton and willful negligence, etc.

The United States moved to dismiss this action insofar as the "plaintiff seeks a declaratory judgment against the United States to determine its liability in the matter of the explosion, asserting that as the United States may be sued only to the extent it waives its sovereign immunity to suit and as the Federal Tort Claims Act permits only a civil action for money damages, the Government may not be sued where the relief requested is a declaratory judgment".

United States District Judge Forman sustained the position of the Government and held that the class action brought by the plaintiff would not result in the benefit claimed, and for that reason he denied plaintiff's motion for a temporary injunction restraining all other actions arising out of the explosion. He said:

> The cases of claimants against these defendants as well as others can be consolidated for trial and multiplicity of actions, at least in this court, can be avoided. [*Pennsylvania R.R. Co.* v. *United States*, 111 F. Supp. 80 (March 5, 1953).]

A total of fifty-eight complaints was filed in the District Court of the United States for the District of New Jersey arising out of the explosion. Relying upon the decision of the Supreme Court of the United States in the Texas City case (*Dalehite* v. *United States*, 346 U.S. 15 (1953)), the United States filed a motion to dismiss the complaints against it for damages sustained in the South Amboy explosion. Judge Forman, in a very learned opinion *sub nom. Pennsylvania R. R. Co.* v. *United States*, 124 F. Supp. 52 (July 29, 1954)[1] held that:



James D. Carpenter received his law degree from the University of Pennsylvania in 1909 and has practiced since then in Jersey City and Newark. He served as United States Commissioner in Jersey City from 1910 to 1920 and is a past President of the Hudson County and New Jersey State Bar Associations. He is a member of the American Bar Association's House of Delegates. He was special counsel to The Pennsylvania Railroad Company in the South Amboy Explosion cases.

> . . . the complaints herein disclose allegations which state claims upon which relief can be granted under existing law [the Tort Claims Act] [28 U.S.C.A. c. 85 and 28 U.S.C.A. c. 171 §2680].

The Kilgore Manufacturing Company, manufacturer of the mines, was an Ohio corporation not authorized to do business in New Jersey. It declined to appear in any of the actions pending in New Jersey, and consequently sixty-six actions were commenced against it and other defendants in the District Court of the United States for the Northern District of Ohio, Eastern Division (Cleveland), one in the Southern District (Columbus) and twenty-four actions were brought against it and other defendants in the Common Pleas Court of Cuyahoga County, Ohio. The United States was made a party defendant in all of the actions brought in the United States courts in Ohio.

1. The charges of negligence made in the complaint appear in this opinion.

The Kilgore Manufacturing Company went into liquidation and its assets were worth considerably less than half a million dollars, while the total claims arising out of the explosion for death, personal injuries and property damage aggregated around $15,000,000.

Taking of Depositions Presents a Problem

With reasonable promptness after these actions were at issue, the taking of depositions from practically all available witnesses was commenced on behalf of both plaintiffs and defendants. Depositions were taken in Florida; Ohio; Washington, D. C.; Pittsburgh, Pennsylvania; Alabama; Maryland; New York City; Newark, New Jersey; and in Pakistan, within sixty miles of the Khyber Pass. Many hundreds of exhibits were marked in evidence.

As no one knew where the first trial would be held, it was agreed among all counsel that there should be but one deposition taken of each witness. Each notice of taking a deposition, however, was entitled in each case in each court and in each state where suits were pending. The cases pending in the Superior Court of New Jersey were consolidated for trial by order of that court, and hence the notice of taking depositions for use in these cases bore only the title of the consolidated cause. Notices of taking testimony in cases in the United States District Court for the District of New Jersey and the other courts in other jurisdictions had at the head of each notice each and every case pending in said courts. Each witness who was examined was sworn by the officiating officer to testify in each of the cases pending in each of the courts where cases involving the explosion were pending. Accordingly, it was necessary for the reporter to make nine original copies of the depositions for filing in the nine courts where the causes were pending, and an original copy either signed by the witness, or signature waived, was filed in each court. The expense of these depositions accordingly was enormous.

Certain of the parties took the deposition of one Hanby in Inverness, Florida. Hanby had been in charge of loading the fuses and detonators at the Kilgore plant in Ohio. This witness testified, among other things, that defective parts were used in the manufacture of the fuses and detonators and that fuses which had been rejected upon inspection and removed from the inspection building were later brought back and used, upon orders of officials of the company. He produced as exhibits parts which he testified were defective, and after they had been marked in evidence as exhibits, a writ of replevin, at the suit of the Kilgore Manufacturing Company, was obtained during the noon recess, and when the hearing was resumed in the afternoon, the Sheriff of Citrus County, Florida, stepped forward and demanded the exhibits. It was claimed that Hanby had stolen Kilgore's property and removed it from Ohio to Florida. The altercation among the fifteen or twenty counsel who were present that followed this attempt to replevy exhibits was settled by having them impounded by the District Court of the United States for the District of Florida, to be forwarded, however, to the first court in which the South Amboy explosion cases should be moved for trial.

Practically all of the persons, firms and corporations that suffered damage to their property in and about South Amboy had been insured, and approximately 200 different insurance companies were involved. These companies set up offices in South Amboy and approximately 8,000 property damage claims were settled within a matter of a few weeks, the insurance companies, as they made payment, being subrogated to the rights of the persons whose property had been damaged. One suit was brought for practically all of these property damage claims in the Superior Court of the State of New Jersey *sub nom. A. & M. Trading Corporation, a New Jersey corporation, and all others named in the schedules attached hereto and made a part hereof.* The schedule listing the claimants, and the type and amount of damage annexed to this complaint, on ordinary legal paper, is nearly four inches thick. A number of the personal injury and death cases were started in the Superior Court of New Jersey, and these cases were transferred to Mercer County, Trenton, New Jersey, for trial.

It was recognized by all parties that the United States was a principal defendant, because of Judge Forman's decision *supra*, 124 F. Supp. 52. Since under the Tort Claims Act, under which it was sued, cases against the United States may be tried only in a United States District Court before a judge without a jury, the plaintiffs in the New Jersey state court actions were reluctant to proceed with a trial in that court because they would not have as a defendant either the United States or the Kilgore Manufacturing Company, the manufacturer of the mines, which refused to enter the state.

When certain counsel applied to the United States District Court in New Jersey to consolidate for trial the limitation of liability action originally filed by James Healing Co. with the cases against the United States, the attorneys representing personal injury and death claimants whose cases were pending in the state court strenuously objected on the ground that they were entitled to trial by jury. The cases in Ohio were not moved for trial because it was doubtful in the extreme whether the courts there had jurisdiction over the United States under the terms and provisions of the Tort Claims Act and certain of the corporate defendants could not be served in Ohio. Meanwhile, many of the widows of stevedores killed in the explosion and persons who suffered personal injuries were writing to Judge Forman inquiring why the cases were not being tried and why they were not receiving money they were entitled to. Workmen's Compensation was being paid to the families of the men who had been killed, but the end of the compensation payments was in sight.

Judge Forman Decides To Try for a Settlement

At this point, Judge Forman decided to try to effect settlement of the litigation.

Judge Forman invited counsel for all the defendants to confer with him on February 21, 1957, and declare whether their clients would contribute to a settlement of these actions. By this time the depositions of practically every witness had been taken, interrogatories and cross-interrogatories

had been served and answered, but there had been no pretrial of any of the actions, nor had there been any determination where the first trial would be held.

Attorneys for all of the defendants attended Judge Forman's conference. Some of the defendants had part or all of their liability insured, and attorneys for the insurers accompanied counsel for the defendants to the conference. Judge Forman pointed out the desirability on the part of all interests of having this entire litigation settled. He stated that he had conferred with the judges in the other jurisdictions and had obtained their approval to his making an attempt to secure an over-all settlement. He stated that he intended to call a meeting of a representative group of attorneys for the plaintiffs to see if they could agree upon a method and means for settling.

Attorneys for some of the insurance companies informed the judge that some of the defendants carried insurance against damages to property; others carried insurance for damage to persons, and they requested that the court obtain a breakdown of the claims as between personal injuries, deaths and property damage. At the end of the conference, Judge Forman appointed a small committee of counsel for the defendants to make their own appraisal of the value of the different classes of claims and to seek agreement on the part of the several defendants to contribute to a settlement.

Judge Forman then called a meeting of a representative group of attorneys for the plaintiffs and asked them to make an appraisal of the value, for settlement purposes, of the thirty-one death cases, which were the most serious single claims; the some two hundred personal injury claims and the property damage claims, and to ascertain what sum the claimants in these three groups would accept in settlement.

At the next meeting of counsel for the defendants, Judge Forman requested the attorneys for each defendant to write on a slip of paper the amount his client would contribute to an over-all settlement, and said that he would run the total and keep the information secret from all the other attorneys. When the judge ran the total in an adjoining room, and returned to the conference, he said he was greatly disappointed because the total came to about $1,000,000. He was confident that the cases could not be settled for any such sum.

When the judge next conferred with counsel for the plaintiffs and received the minimum that the attorneys for the three groups of plaintiffs would accept in settlement, he found that the minimum total was about $8,000,000. He told this group of attorneys that their figure for the purposes of settlement was unrealistic, judging by what counsel for the defendants had told him; that he was sure that that amount could not be raised; and he asked them to confer again, and sharpen their pencils. He pointed out to the attorneys for both plaintiffs and defendants the great expense in time and money that would be entailed in trying the actions, and that it appeared that if the cases were tried, there would have to be two and perhaps three trials. There would have to be one trial without a jury in the actions against the United States, with which possibly the limitation of liability action might be consolidated for trial, and at least one other trial in the New Jersey state courts, and at least one trial in Ohio if the plaintiffs sought to recover judgment against Kilgore Manufacturing Company, and that each of such trials would undoubtedly take many weeks, and would be extremely expensive both in money and time for counsel, the courts and juries.

Judge Forman personally held many conferences, between February, 1957, and the consummation of the settlement on November 25, 1959, with attorneys for individual defendants, with attorneys representing various plaintiffs with large claims, and groups of attorneys. He individually called upon some of the defendants and representatives of defendants. He made a number of trips to the Department of Justice in Washington and conferred with attorneys representing the United States as well as the Attorney General, and finally, largely as a result of his own efforts, he raised a "pot" of $3,310,000 with which to settle all claims in all jurisdictions. The United States Congress appropriated $400,000 toward this settlement.

The judge made no attempt to apportion the monies among the three classes of claims. He left that task to the attorneys for the plaintiffs, and they decided among themselves how much money should be devoted to the settlement of death claims, how much should be devoted to the settlement of personal injury claims and how much for property damage claims. The attorneys representing each group of plaintiffs then determined in conferences among themselves how much thus allotted to their three groups should be awarded to the several plaintiffs. When it appeared that settlement would be accomplished, the plaintiffs requested the defendants to prepare a form of release that would be satisfactory to all the defendants. Such a release was agreed upon in the fall of 1958, and 2,000 printed copies were delivered to the attorneys for the plaintiffs for execution. On several occasions Judge Forman called counsel for all parties before him and urged that the releases be executed and that the settlement monies be paid into the Federal Court in Trenton. On October 1, 1959, pursuant to the Judge's instructions, the defendants deposited with the federal court the amounts they had agreed to pay, a total of $3,310,000, no defendant knowing how much any other defendant had contributed.

The judge thereupon called another meeting of representatives of plaintiffs' counsel and urged them to submit their releases to a committee of attorneys for the defendants, stating that he would not order any of the money distributed until the defendants consented to an order for distribution, and he said he would not sign such an order until all the releases and discontinuances with prejudice of all actions in all jurisdictions, in proper form, were filed with the Clerk of the United States District Court in Trenton. Counsel for the personal injury and death plaintiffs informed the court at this joint conference that they had been unable to secure certain releases because it was found that they had underestimated the damages suffered by certain plaintiffs. They said that they needed an additional $44,157.30

to be deposited for allocation and distribution to certain death claimants and personal injury claimants who would not sign releases for the amounts allocated to them by the attorneys representing these groups of claimants; and that the other claimants who had been advised of the amounts allocated to them would not reduce the amounts that had been promised them in order to satisfy the objecting plaintiffs. Accordingly, one of the insurance companies paid into court an additional $44,157.30 to satisfy the objecting claimants who had declined to sign releases. By November 25, 1959, releases in practically every case had been deposited with the clerk of the court, together with releases from the defendants to each other, and consent orders for the discontinuance with prejudice, and without costs, of every case in every jurisdiction. The approximately two hundred insurance companies that had been subrogated to thousands of claims of persons, firms and corporations that suffered property damage, gave to the defendants not the type of release that was given by the individual claimants, but insurance company release and indemnity agreements covering all of the property damage claims that had been paid by the insurance companies, which tremendously lessened the number of individual releases that were filed with the Court.

On the same date, November 25, 1959, the judge signed an order authorizing the clerk to distribute the settlement fund as follows:

(a) $1,235,757.30 having been allocated for all personal injury and death claims, said sum to be paid by the Clerk to the payees and in the amounts set forth in Schedule A annexed to the Order;

(b) $2,118,400.00 having been allocated for all property damage claims, said sum to be paid by the Clerk to the payees and in the amounts set forth in Schedule B annexed to the Order.

The order further specified how the checks should be drawn, to whom the checks for the several plaintiffs and their attorneys should be made payable, and further provided that in cases where releases had not been approved by defendants and filed within six months from the date of the order, the attorneys for such plaintiffs should file with the clerk of the court a statement entitled in the cause, showing the name of the claimant whose claim had not been covered by a release and indemnity agreement, and the money set apart for such claimant should be held by the clerk in the registry of the court, to be disbursed to or in behalf of the claimant when the claimant should make application therefor, accompanied by a duly executed release and should have secured an order of the court authorizing payment by the clerk. The order for distribution further provided that the return of any money to the clerk should in no way and to no extent affect the binding force of the dismissal with prejudice of the case or cases in which the claim for which such money was allocated had theretofore been asserted. Provision was likewise made in the order for payment to the compensation carriers of the amounts for which they were subrogated.

The order for distribution finally provided that the defendants be authorized and directed to cause to be entered and filed in all courts in all jurisdictions, orders and stipulations for dismissal with prejudice and without costs of all the cases arising out of the explosion on May 19, 1950, and that the entry of this order authorizing distribution should constitute consummation of the settlement of said cases.

Finally, the order reserved jurisdiction to the end that such further order might be entered by the court as might be necessary in connection with the distribution of the settlement fund.

Separate stipulations of settlement and discontinuance on forms required by the United States to settle the cases under the Federal Tort Claims Act, as prepared by the Department of Justice, had been filed with the court prior to the order for distribution, so that when the order for distribution was signed and filed, on one day over 8,000 pending cases in 186 separate suits in federal and state courts in four separate states and the District of Columbia were dismissed with prejudice.

It is interesting that shortly before this settlement was consummated, District Judge Forman, who practically alone accomplished this result, was confirmed as a judge of the United States Court of Appeals, Third Circuit. Although Judge Forman formally retired March 31 of this year, he has continued to sit by designation as a Senior Judge of the United States.

Our State Bar Associations:

The New York State Bar Association

THE NEW YORK STATE Bar Association, characterized by Dean Roscoe Pound as "the oldest of the State Bar Associations organized before 1878 with unbroken continuity", owes its beginnings to the initiative of The Association of the Bar of the City of New York. In 1875 that Association authorized a committee to invite delegates from throughout the state to attend a convention in Albany. On November 21, 1876, ninety-one delegates met in the Assembly Chamber of the old Capitol to organize the New York State Bar Association and elected a New Yorker, John K. Porter, as its first President. The long history of both associations has been marked by warm co-operation, and nine lawyers have served as Presidents of both associations. Three of those nine, Joseph Choate, Elihu Root and Charles Evans Hughes, went on to serve as Presidents of the American Bar Association.

The Association was incorporated by statute on May 2, 1877. This was the year when the famous Supreme Court decision in *Pennoyer* v. *Neff* was handed down, the Brooklyn Bridge was under construction, and Thomas Edison was just entering upon experiments at Menlo Park, which culminated two years later in the invention of the incandescent lamp! One wonders what the reaction of our founders might be were they, today, to see Committees on Atomic Energy and on Electronic Data Processing and its Application to the Law listed among the activities of the Association!

Coincidentally, the oldest voluntary state bar is housed in probably the oldest headquarters building of any association in the country. Its present headquarters, dedicated in 1953, was built in 1799 and was used in the early 1800's as the Executive Mansion for the Governor of the State, Daniel J. Tompkins, who later became Vice President of the United States. Its stately exterior belies the modern equipment it houses to meet the ever-increasing demands of servicing more than 11,400 members.

Organization

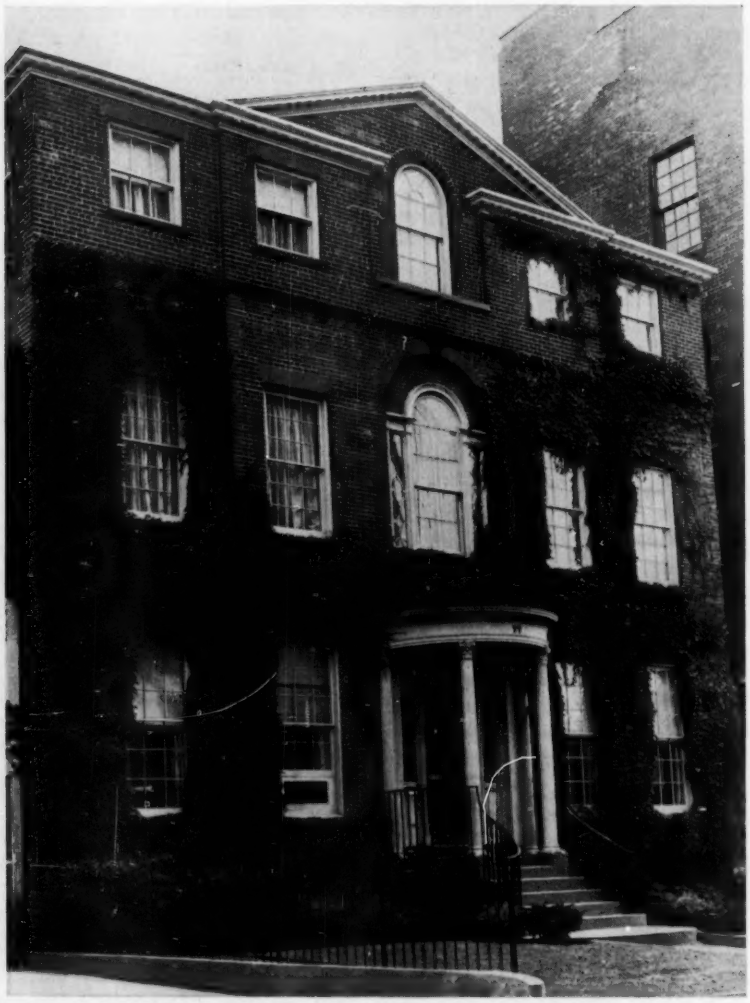
The affairs of the Association are managed by an Executive Committee consisting of the officers, one vice president and three committee members from each of the ten judicial districts in the state, the chairmen of the various sections and the past presidents of the Association. Its activities are conducted by some sixty-five committees and nine sections; viz, Antitrust Law, Banking Law, Food, Drug and Cosmetic Law, Insurance Law, Judicial, Municipal, Taxation, Trial Lawyers and Young Lawyers. Dues range from $6 for those admitted less than five years to $22 for regular members. The annual budget this year is $223,000. Supplemental funds for other activities are made available through a State Bar Foundation. The full-time professional staff, in addition to the Executive Director, includes a Director of Public Information and an Executive Assistant. The editors of the publications of the Association, the *State Bar Journal*, the *Lawyer Service Letter*, the *Legislative Circular*, the Director of the Continuing Legal Education program and the Counsel to the Grievance Committee serve on a retainer basis.

Major Accomplishments

The reputation of a professional association is measured by its contributions to the well-being of the profession and the public. Too few outside of the profession are aware of the contributions of the organized Bar to better government and better justice. Active bar members know only too well the time, effort and expense required to achieve results. Thus, a few illustrations will indicate the New York State Bar Association's accomplishments at the national and state level.

On the National Level

Unknown to most, but worthy of mention, is the fact that in the late 1800's the Association drafted a plan for a world court to settle international disputes, and a memorial to the Congress and the President was prepared urging its adoption. The plan reached its fulfillment with the establishment of the present world court. During the same period, a committee secured enactment of legislation providing for uniform statewide bar examinations under the supervision of a single Board of Law Examiners. This plan was generally adopted throughout the country and did much to elevate the standards of the profession.



House of the New York State Bar Association

The Association is also credited with initiating the movement which resulted in the first passage of an arbitration law in the State of New York. This, in turn, became the model for a proposed uniform statute, later accepted nationally, which was the basis for eventual treaties on international arbitration.

The Association was a pioneer in establishing the first organized bar committee on American citizenship, and through its efforts bar associations throughout the country established similar committees which were primarily concerned with improving the status of American citizens, particularly those of foreign birth or descent.

Long forgotten in the tedious effort to enact legislation to provide some sort of retirement benefits for the self-employed, is the fact that the idea originated in the Taxation Section of the Association through a small committee working in co-operation with Congressman Eugene J. Keogh.

At the State Level

Like every other strong bar association, the New York State Bar Association has devoted its most serious attention to the improvement of judicial administration. Its efforts have been far-ranging and continuous, and brief reference is made to what may be considered some of the major accomplishments of the past eighty-five years.

The Association was instrumental in arranging the publication of what are known as the "Miscellaneous Reports" which preserve all opinions of the courts in the state, other than those of the Court of Appeals and Appellate Divisions which are printed in official reports. Its efforts likewise resulted in the publication of weekly "Advance Sheets" to furnish lawyers prompt information on current decisions and opinions, pending their later publication in official reports.

The Association led the way to the first statutory consolidation in New York State. It persuaded the legislature to house the Court of Appeals in adequate quarters of its own in what was known as the old State House, and is now one of the most beautiful courthouses in the country. The Association was instrumental in the complete reorganization of the state's judicial system in 1895, which system remains substantially in effect today. It continues to study and makes recommendations for revision of the court system in the state. It initiated the effort which resulted in the creation of the first Judicial Council of the State of New York in 1934, and in 1941 its recommendations resulted in enactment of the first substantial Motor Vehicle Safety Responsibility Act for the State of New York.

In recent years its achievements, to mention but a few, include a major part in the revision of the corporation laws of the state; enactment of public defender legislation in New York State; intensive studies and recommendations dealing with complete revision of the Civil Practice Act and Rules of Procedure; adoption of uniform rules for disciplinary proceedings in upstate New York; legislation to permit the court to charge back to the county the costs of disbarment proceedings against an attorney practicing in that county, and a major study, believed to be the first of its kind, in co-operation with the Attorney General of the State of New York, of the New York State anti-trust laws. At the request of Legislative Commission Chairmen, Association committees are now co-operating in reviews of the law of decedent's estates and penal law and criminal procedure, preparatory to expected revision.

Some Current Projects

Three years ago, the Association initiated a major public relations program. The program won the Associ-

ation a Silver Anvil Award from the American Public Relations Association for "outstanding public relations performance in the field of professional organizations". It also received a Freedoms Foundation Medal for promotion of statewide observations of Constitution Week on the theme: "Responsibility of citizens to uphold and protect their federal constitution". A series of short 5-minute films has been produced. A periodic newsletter keeps members informed of current activities.

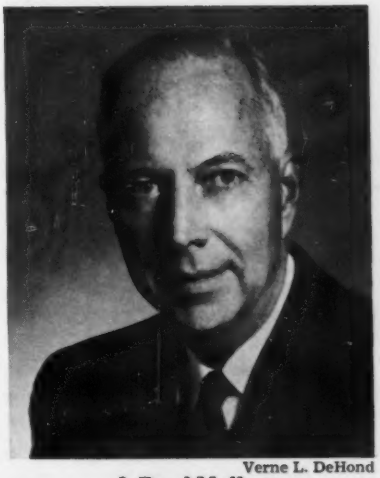
A newspaper series appears weekly in 158 newspapers. The same material is now being used in more than 400 high schools in connection with classroom work. In conjunction with the State Education Department, a course entitled "Law Everyone Should Know" is conducted as part of a regular adult education program. Recently the Association had a specially designed exhibit booth constructed which is used at State Fair and other similar exhibitions, both by the Association and by local bar associations and some state governmental agencies. In addition, a speaker's manual was recently published and over 2,000,000 pamphlets have been distributed as part of the public information program.

A little over a year ago, the office of Director of Continuing Legal Education was established and development of a long-range statewide program is well under way.

This year the Association is concentrating upon a practical program of professional economics. It has just concluded the first statewide survey of law office practices and lawyer incomes in the state. The results of that survey are being used as the basis for a series of one-day professional economic institutes to be conducted in seven cities this fall.

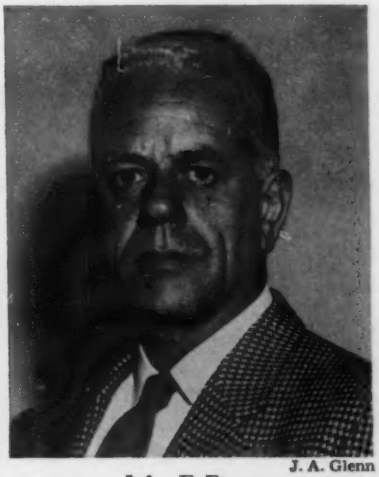
A unique and detailed survey of the 3,000 members of the Young Lawyers' Section was conducted to obtain a bird's-eye view of the special problems confronting the lawyer in his early years of practice and of those elements which appear to make for success or failure.

In the past year, considerable effort was expended in revamping both court and committee rules dealing with grievance procedures, and a temporary counsel to the Grievance Committee was retained. It is expected that a full-time counsel will be employed this fall to handle grievance matters, unlawful practice problems and related subjects.



Verne L. DeHond

J. Boyd Mullan
President



J. A. Glenn

John E. Berry
Executive Director

No résumé of the activities of the Association would be accurate if it were not acknowledged that, since its early beginning, it has enjoyed the closest co-operation and assistance from county, local and federated bar associations. The active participation of those associations and their committees lend strong support to the programs of the State Bar.

A Look Ahead

Some 35 years ago, the then President of the Association said:

> The past has its lesson, the present its duty, the future its hope. We shall be poor students of the past and of the present if we are not taught thereby what course to mark out for the future. Fine as the record of the Association is, admirable as its achievements may have been; nevertheless, I think we may find opportunity for great improvement in the service and influence of this Association.

The New York State Bar Association has found, and will continue to look for, just such opportunities.

New York Members of the House of Delegates of the American Bar Association

Henry C. Blackiston, New York City, The Martime Law Association of the United States.

Arthur VD. Chamberlain, Rochester, New York State Bar Association.

Harold J. Gallagher, New York City, Former President, American Bar Association.

Cloyd Laporte, New York City, New York County Lawyers' Association.

Orison S. Marden, New York City, The Association of the Bar of the City of New York.

David W. Peck, New York City, New York State Bar Association.

Churchill Rodgers, New York City, Assembly Delegate.

Clarence R. Runals, Niagara Falls, New York State Bar Association; and State Delegate (Interim).

Willard P. Scott, New York City, Section of Corporation, Banking and Business Law.

Whitney North Seymour, New York City, Last Retiring President, American Bar Association; and Chairman, National Conference of Judicial Councils.

Harrison Tweed, New York City, The American Law Institute.

Books for Lawyers

GOVERNMENT LITIGATION: CASES AND NOTES. By David Schwartz and Sidney B. Jacoby. Law Schools of Georgetown University and New York University. 1960. $7.50. Pages xxviii, 456. *(Reviewed by Frederick Bernays Wiener. Mr. Wiener is a member of the District of Columbia Bar with extensive experience in appellate work. He is the author of several books on legal subjects.)*

As the authors point out, "The Government's business and other relations with the entire community and its individual members continue to grow wider and deeper." Moreover, since "The adversary system, the jurisdiction of courts, procedure—in a word, litigation—are the background and the unstated measure of everything that lawyers do", it necessarily follows that "all lawyers are government litigation lawyers"—and so will profit from having available the materials in the present collection, materials that are not ordinarily come by in areas occupied by the usual law school courses.

Messrs. Schwartz and Jacoby's coverage is comprehensive, and the notes that they have appended to the several cases include citations and leads that the practitioner unfamiliar with government litigation is most unlikely to find on his own. The subjects covered include, among many others, the vexed problem of settling government cases; attorneys' fees and conflict of interest; the Court of Claims and the Tucker Act; the Federal Tort Claims Act; discovery and privilege of government papers; and the incidents of sovereign immunity.

Having indicated the foregoing, no nit-picking will be undertaken; this reviewer has already indicated the lack of utility to be found in the usual boilerplate case-book review, with its detailed counter-preferences for the division of the subject into topics and for the inclusion and exclusion of individual cases, as well as its heavily documented evidence of the reviewer's learning, proofreading abilities, and routine resort to Shepard's *Citations*. See 5 *J. of Legal Education* (1953) 483-484.

But it is appropriate to call attention to one technique of omission, simply because it seems to be increasingly resorted to elsewhere, *viz.*, the habit of giving the name and citation of a case, followed by "certiorari dismissed"—when in fact such dismissal was by stipulation and followed an earlier grant of the writ. *E.g.*, at page 141, *Elchibegoff* v. *United States*, 106 C. Cls. 541, certiorari dismissed, 329 U. S. 694, omitting to note that it was granted at 329 U. S. 704; and, at page 234, *Derecktor* v. *United States*, 129 C. Cls. 103, 128 F. Supp. 136, certiorari dismissed, 350 U. S. 802, again omitting to note the earlier grant at 348 U. S. 926.

Both cases are important, *Elchibegoff* because it marked the apparent end of the rule that an employee complaining of illegal discharge had first to establish title to the office, *Derecktor* because it upheld the Government's refusal to supply documents without which the property it sold the plaintiff could not be transferred. The circumstance that the Supreme Court granted certiorari in both cases, at the instance of the Government in the first and on the plaintiff's petition in the second, amounts to a warning that these issues cannot be regarded as foreclosed in the future. (Indeed, the Government consented to entry of a judgment against it in the *Derecktor* case in preference to defending it in the Supreme Court; see 132 C. Cls. 812.) There are other examples in the books, also, which show the far-reaching significance of a grant of a writ of certiorari that the parties later stipulated to dismiss. See *Briefing and Arguing Federal Appeals*, page 233. It is therefore not in any sense pedantry to remark on the omissions now noted.

INTRODUCTION TO JURISPRUDENCE. By Dennis Lloyd. New York: Frederick A. Praeger. 1959. $8.85. Pages xxiii, 482. *(Reviewed by Lester E. Denonn. Mr. Denonn is a 1928 graduate of the New York University Law School and practices law in New York City.)*

The author is Quain Professor of Jurisprudence in the University of London and has prepared his text for use in courses in philosophy of law and jurisprudence. He felt the need of such a work despite the existence of comparable compilations, particularly in this country in the early work of Keener through Jerome Hall, Simpson and Stone, the Cohens and Morris. But this is not just another textbook. It invites perusal as there are few publications in the field today which are as up to date and which so aptly supply challenging quotations and references to Bertrand Russell and Ludwig Wittgenstein as well as from the more usual sources. The author displays a balanced background in contemporary philosophy as a firm foundation for his presentation.

Each of the eleven sections has the author's "full commentary setting out the background and inter-connections between the differing approaches and a critical appraisal of the viewpoints illustrated in the selected texts". Then follow well chosen selections from books, articles and cases which seek to present both sides of the subject under discussion. As to this presentation, the author makes the following just and refreshing comment: "At least it seems to me that the existing plan may achieve more in encouraging the serious student to range beyond the covers of his chosen textbook, than will a series of potted summaries." The suggestion seems warranted that not only the serious student can be thus edified but also the serious practitioner who would know the undercurrents of thought that run in all directions through philosophy, science, sociology, politics and the law.

The first two sections are devoted to the nature of jurisprudence and the meaning of law. It is particularly in the latter section that contemporary linguistic philosophy is brought to bear

along with a discussion of the perennial problem of the relation between the law and morals.

A section on natural law covers the historical background, the variety of presentations, the criticisms and the present revival.

In the fourth section the Austinian imperative theory with its concomitant notion of sovereignty is presented in its setting of utilitarian philosophy.

The Sociological School is illustrated by Ihering, Ehrlich and Pound, among others. There is a fair, but vigorous critical presentation of our American Realists with background material from Gray, Holmes, James, Dewey and Bertrand Russell as well as samples from Llewellyn and Frank. A most interesting section is devoted to the Scandinavian Realists, Olivecrona, Lundstedt and Ross, who should be better known here. The author draws a comparison and contrast between their views and that of our American Realists. Hegel as woven into the Marxian view is exemplified by selections from Marx, Engels and Lenin, as to which the author judiciously quotes from Kelsen: "Nothing can show more clearly the futility of the dialectic method than the fact that it enables Hegel to praise the state as a god and Marx to curse it as a devil." Kelsen himself and his pure theory of law is presented in the next section with a critical appraisal and an able comparison with Austin.

The important subject of custom is considered at length, particularly as it is found basic to the views of Savigny and Maine and the Historical School. The concluding section on the Judicial Process opens with a good discussion of *stare decisis*, *ratio decidendi*, judge-made law, judicial reasoning, statutory construction and the nature of equity in our jurisprudence. This is followed by an able choice of selections going from Aristotle to Goodhart, Cardozo and once more to contemporary philosophy with a selection from J. Wisdom.

One of the significant features of this work is the footnotes added to the selections by the author in which he gives detailed bibliographic references and also his critical comments based upon his own point of view. This work is a rewarding venture for anyone seeking a broader base for an understanding of the place of law in society.

LAWYER. By Talbot Smith. New York: The Macmillan Company. 1960. $3.50. Pages ix, 201. *(Reviewed by Knight Edwards, of the Providence, Rhode Island, Bar.)*

This small volume was written as part of a series for high school and college students seeking advice on a choice of career. The book is much more than its stated purpose indicates. Here we have, in fact, several reflective essays on lawyers and the law, with, *inter alia*, interesting expositions on the study of law, the nature of law practice, ethics, the lawyer's place in the community, the growth and development of the law, and the judicial process.

Judge Smith's book thus reaches beyond his principal purpose of exposition to the young. In the words of the old story (adapted) about the Southern preacher, he "preachifies fine, and argufies fine", and he also "specifies wherein". His specifics should be required reading for first-year law students; and practitioner, judge or layman will find them stimulating.

The author's style is clear and informal; sometimes a bit too informal and self-consciously directed to the young. Since even junior high students read newspapers, a footnote explaining the meaning of "plaintiff" and "defendant" sounds patronizing.

This cavil, however, should be set off against excellent statements such as (pages 165-166):

> The traditions of the profession teach us that we do not practice for gain, that none is too weak for our aid and none too strong for our attack. We are taught to look for the substance behind the form, to accord the beggar his due no less than the banker, and that truth and honor must walk with us down whatever road we travel. If we remember these things our "public relations" will be no problem. If we do not remember them there is no campaign of self-glorification that can help us. The people are not stupid.

His peroration (pages 186-187) is similarly inspirational:

> . . . You wanted to know what a lawyer did, what his life was like. This, you now see, is what his life is like: It is study, hard, unremitting study. It is counsel, and it is combat. It is sometimes a lonely life, because your conscience, and the traditions of your profession, will call upon you to defend unpopular people and causes. Great wealth you will not know, neither its seductions nor its corrosion.
>
> But riches beyond the power of description will be yours. You will give strength to the weak and tongue to the terrified. You will walk with honor on one side and integrity on the other and you will know their warmth and their companionship. . . .

One hopes the State of Michigan appreciates the privilege of having such an articulate idealist as a member of its Supreme Court.

TWO FACES OF FEDERALISM. By Robert M. Hutchins. Santa Barbara, California: Center for the Study of Democratic Institutions. 1961. Pages 126. *(Reviewed by Robert R. Granucci, who is now a Deputy Attorney General of the State of California and has served as law clerk of the Superior Court of the City and County of San Francisco.)*

Two Faces of Federalism is a singularly worthwhile booklet that can be had for the asking, a fact that is of itself worthy of note. The work consists of a short paper by Dr. Robert M. Hutchins, followed by an edited version of a discussion of the consultants to the Center for the Study of Democratic Institutions.

Dr. Hutchins is an educator, not a constitutional lawyer, and his paper is not and was not intended to be a scholarly dissertation on constitutional law. Rather, it is a surprisingly nontechnical and yet penetrating discourse on the problem of liberty in a modern technological society. Dr. Hutchins uses the expression, "two faces of federalism", to describe two possible means of guaranteeing liberty. It should be noted that by the use of the term "federalism" Hutchins means the relationship between government and the individual in a free society, not the relationship between the federal government and the states, as that term is commonly understood.

The first approach would promote liberty by making government incompetent to act in certain areas. Thus, under the first approach, freedom of religion would be assured by depriving the government of power to regulate worship or speech. Additionally, for the further protection of the individual, this approach also contemplates that the free society might contain certain centers of power that compete with government. For this "theory of countervailing power centers", Hutchins uses the term "pluralism".

Contrasted with the negative approach of the "first face", the "second face" proposes a system of liberty under law—liberty promoted by governmental action rather than restraint. Under this theory functions would be allocated among national and local governments, individuals and associations by a process both constitutional and political. In short, under such a system, the power of government would be limited by deliberate political choice rather than by constitutional inhibition.

Dr. Hutchins suggests that "both faces of federalism have been visible throughout American history, and we need them both" and that "though the first has dominated our way of talking, the second has described our way of acting" (page 8). He states that the theory behind this second face ought to be explored and enunciated. Involved in this second face is the problem of unity and consensus. Dr. Hutchins suggests that natural law concepts can provide the basis of both national consensus and any guarantee of liberty under law, for "liberty under law has little commendable to offer if the law is nothing but the expression of the power of the state" (pages 22-23).

Following the paper is a discussion by the consultants to the Center on Dr. Hutchins' thesis. This exchange of ideas among persons of widely different background and opinion makes fascinating reading. To this reviewer, at least, Dr. Hutchins' notions, particularly those relating to the role of natural law, appear to survive fairly well the acid test of critical and intelligent discussion, the high point of which, for the reviewer, was the exchange between Justice William O. Douglas and John Courtney Murray, S.J., on the natural law implications of procedural due process (pages 91-93).

In conclusion, this booklet is highly recommended for lawyer and layman alike. Instructors in constitutional law will find it a useful collateral source and a catalyst for classroom discussion. All who examine it, whether they agree with Dr. Hutchins or not, will find both pleasurable and provocative reading.

PREDICTING DELINQUENCY AND CRIME. By Sheldon and Eleanor Glueck. Cambridge: Harvard University Press. 1959. $6.50. Pages 283. *(Reviewed by Maurice D. L. Fuller, Jr., of the San Francisco Bar.)*

Separating the potential criminal from the law-abiding citizen before the commission of any serious crime and predicting the probable effect upon a convicted criminal of various conceivable sentences has only recently become of truly scientific, rather than philosophic, study. The scientific search for really reliable methods of predicting the likelihood of criminal behavior or the probability of its recurrence in a particular individual is still in its infancy. Two of the most prominent pioneers in the vanguard of such study are Sheldon and Eleanor Glueck, the authors of *Predicting Delinquency in Crime.*

The book is an outgrowth of a continuing study they have conducted of the causes for criminal behavior and the problem of recidivism. Analysis of the numerous case histories collected during a lifetime of research convinced them of a correlation between the probable conduct of delinquents or criminals and certain objective facts about their background, readily available to probation and parole authorities. Application of actuarial and statistical methods to those histories resulted in the prediction tables which comprise the major part of the book. As the authors themselves note, the accuracy of the tables has not yet been fully tested in practice. Their tables are likely to undergo further refinement. But the results of preliminary tests of the tables in the field have been very encouraging.

The sections dealing with the construction and operation of the Glueck prediction tables are definitely not for the casual reader and require a statistical background. The development and availability of prediction tables should, however, be of interest to those concerned with the administration of criminal law in two respects. The authors themselves recognize the limitations of predictive devices and the need in particular cases for exercise by the judge of his own judgment. There is, however, no doubt that sentencing decisions can be vastly improved by the use of scientifically developed tables for predicting the probable results of different sentences upon criminals with varying backgrounds. With the guidance thus provided, a judge would be in a better position to determine which course is most likely to result in reformation of the individual criminal or delinquent and to protect other citizens from the recurrence of criminal behavior. There is, moreover, no more demoralizing influence upon respect for the law in general and the court in particular than the apparent caprice, prejudice or poor co-ordination reflected in the great disparity of sentences accorded different criminals in similar situations. The Glueck tables indicate that different criminals guilty of similar crimes should be treated differently. But the general use of predictive tables clearly promises greater uniformity in sentencing decisions.

The scientific development of predictive tables should also provide much food for thought to those concerned with reform of the substantive criminal law. Those debating as to which particular aim of society should be emphasized in a penal statute all too often debate without any real facts as to the effect of different solutions upon the likelihood of future criminal behavior. The Glueck study, and the other studies which will undoubtedly follow in the same field, should serve as a source of concrete information on that question and the extent to which different aims —*e.g.*, reformation of the individual, protection of other citizens—can be reconciled.

SUPREME COURT REVIEW—1960. Edited by Philip B. Kurland. Chicago: The University of Chicago Press. 1960. $6.00. Pages 326. *(Reviewed by William H. Allen, of the District of Columbia Bar. Mr. Allen is a former law clerk to Chief Justice Earl Warren.)*

This volume is the first in what is planned as a series of annual critical reviews of the work of the United States Supreme Court. The *Review*, which bears the imprint of the Law School of the University of Chicago and is edited by Professor Philip B. Kurland of that institution, is designed as a response to a point frequently made recently—that there has been a lack of disinterested, competent professional criticism of the quality of the product by which the Court must be judged, its opinions.

Actually, at the very time this lack has been lamented, it has to a very considerable extent been overcome, notably by the very persons who have decried it. The period in which scholars and disinterested practitioners may have felt indisposed to engage in responsible, professional criticism of the Court for fear of being identified with or contributing to the irresponsible criticism that followed, in great volume, the school segregation decisions, seems to be passing. In any event, whatever the size of the void *The Supreme Court Review* will fill, the project deserves consideration on its own merits, and this first volume stands up well against any criterion.

It consists of seven articles or essays, each of them devoted to or suggested by a case or cases decided in the October, 1959, Term. The range of subject matter and of manner of treatment is wide. For example, Professor Kenneth L. Karst of Ohio State University discusses "Legislative Facts in Constitutional Litigation", treating of a variety of recent and not-so-recent cases involving both economic and personal rights issues. On the other hand, Professor Bernard D. Meltzer of the University of Chicago writes forty lucid pages on a single opinion of the Court, *Order of R.R. Telegraphers* v. *Chicago and Northwestern Ry.*, 362 U. S. 330 (1960), in which the Court held that the Norris-LaGuardia Act prohibited a federal court from granting an injunction against a threatened strike in support of a demand that a railroad should not abolish existing jobs without consent of a union.

An especially notable contribution is the article by Professor Edward L. Barrett, Jr., of the University of California, on "Personal Rights, Property Rights and the Fourth Amendment". Professor Barrett persuasively develops the thesis that recent opinions of the Supreme Court have, in his words, "resulted in extending greater protection to property interests than to personal liberty" and in giving the average law-abiding citizen less protection in the privacy of his property and person than the suspected criminal. It is this kind of stock-taking analysis—a look at where a series of case-by-case decisions is taking the Court and us—that will be the greatest service this publication can render to the Court and through it to society.

Other pieces include David P. Currie on "Federalism and the Admiralty: The Devil's Own Mess", Professor Charles L. B. Lowndes on "Federal Taxation and the Supreme Court" (Professor Lowndes examines the Court's federal income, estate and gift tax decisions and finds in them no such virtue as to counterbalance what he regards as the obvious disadvantage in the way of delay and burden upon the Court to maintaining the Court as the final arbiter of statutory tax questions), and Dean Edward H. Levi on "The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance".

Implicit in most of the articles is a point that is made explicit by Professor Harry Kalven, Jr., of the University of Chicago, in his discussion of "The Metaphysics of the Law of Obscenity"—the very great difficulty of the Court's job, the hardness of the choices it must make, the imponderables that must enter into its decisions and that it must try to articulate in reasoned judgments.

One comes away from this book happily reassured that critical discussion of the Court need not take the form of easy generalizations about activism versus judicial restraint or attribution of a Justice's opinions to his background. No doubt, as Professor Meltzer suggests in his article, "it is easier to point to deficiencies in an opinion of the Court than to explain why they arose, or, indeed, how they should have been cured", but a dispassionate analysis of deficiencies in opinions and developing doctrine is a necessary first step.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Commerce . . .
taxation

State of Alaska v. *Arctic Maid*, 366 U. S. 199, 6 L. ed. 2d 227, 81 S. Ct. 929, 29 Law Week 4393. (No. 106, decided May 1, 1961.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

This decision upheld the validity of an Alaska tax on catching and freezing fish in Bristol Bay, off Alaska's southwestern coast.

Respondents were corporations or partnerships that fish commercially in Bristol Bay, freezing the fish and transporting them for canning to Puget Sound, in Washington State. Respondents operate both freezer boats, which because of the shallow waters in the bay remain more than three miles from shore, and catcher boats which operate within the three-mile limit. The freezer boats also buy fish from independent fishermen. The tax statute in question imposed a four per cent levy on "Freezer ships and other floating cold storages", the value for tax purposes being computed on "the actual price paid" for the fish, it being provided that "Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

Alaska brought these suits for taxes claimed to be due under the statute. The District Court held for plaintiff, ruling that the taking of the fish was the taxable event, not the freezing of the fish. The Court of Appeals held that the freezing of the fish was the taxable event and that the tax could not be levied on respondents because the freezing and storage of fish under these conditions was an inseparable part of interstate commerce.

The Supreme Court reversed, speaking through Mr. Justice Douglas. The Court reasoned that taking fish and freezing fish were separate activities and that Alaska clearly had power to regulate and control the taking of fish in her territorial waters. The Court cited *Toomer* v. *Witsell*, 334 U. S. 385, and *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, as governing this case. "Here, as there, the tax is an occupation tax", the Court said, "Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach." Since it did not know how many fish were caught outside the territorial waters of Alaska, the Court remanded the cause to the Court of Appeals for further proceedings.

Mr. Justice Harlan wrote a dissenting opinion which argued that the tax violated the commerce clause because it imposed a higher tax on the freezer boats that operated solely in interstate commerce than it did on a local freezer whose product was sold to consumers in Alaska.

The case was argued by Gary Thurlow for the petitioner and by Martin P. Detels, Jr., for respondents.

Railroads . . .
job security

Brotherhood of Maintenance of Way Employes v. *United States*, 366 U. S. 169, 6 L. ed. 2d 206, 81 S. Ct. 913, 29 Law Week 4399. (No. 681, decided May 1, 1961.) *On appeal from the United States District Court for the Eastern District of Michigan. Affirmed.*

The basic issue here was whether the Interstate Commerce Act guarantees a "job freeze" or merely compensation benefits to railroad employees affected by a merger of two railroads. The Court held that the statute requires only compensation benefits.

The Interstate Commerce Commission approved merger of the Delaware, Lackawanna & Western Railroad Co. and the Erie Railroad Co., and followed the recommendation of its hearing examiner that compensation benefits be awarded to employees displaced or discharged as a result of the merger. The Railway Labor Executives' Association contended that the language of the statute guaranteed that all employees must remain in the surviving company's employment for at least the length of their previous employment up to four years. The District Court granted a temporary injunction restraining implementation of the Commission's order, but, after hearing the merits, dissolved the injunction and dismissed the RLEA's complaint. The language of the statute in question was this: "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by the railroad affected by such order being in a worse position with respect to their employment. . . ."

Speaking for the Supreme Court, the Chief Justice affirmed the holding of the District Court. The Court rested its decision on the legislative history of Section 5(2)(f), and on the long-

Reviews in this issue by Rowland Young.

standing administrative interpretations of that section. The Court pointed out that the statutory language was worked out by a conference committee of the House and Senate which rejected an amendment to the original bill that would clearly have imposed a "job freeze". To hold that such a freeze was intended by the Congress, the Court said, would make it necessary to say that "a substantial change in phraseology was made for no purpose and to disregard the statements of those House members most intimately connected with the final version of the statute". Furthermore, the Court said, subsequent interpretations, including arguments by the appellant in an earlier case, supported its view of the statute.

Mr. Justice Douglas dissented, arguing that at best the statutory language was ambiguous. This case "concerns the impact of economic and technological changes on workers and the manner in which government will deal with it" the dissent states, and the ambiguity in the proviso in question should be read in favor of the employees. "In a realistic sense a man without a job is 'in a worse position with respect' to his 'employment,' though he receives some compensation for doing nothing", the dissent declared, echoing the statutory admonition. "Many men, at least, are not drones; and their continued activity is life itself."

The case was argued by William G. Mahoney for appellants, by Archibald Cox for appellees, United States and Interstate Commerce Commission, and by Ralph L. McAfee for appellee, Erie-Lackawanna Railroad Company.

Servicemen . . .
forfeiture of pay

Bell v. *United States*, 366 U. S. 393, 6 L. ed. 2d 365, 81 S. Ct. 1230, 29 Law Week 4424. (No. 92, decided May 22, 1961.) *On writ of certiorari to the United States Court of Claims. Reversed and remanded.*

The American servicemen who went over to the Communist side while they were prisoners of war in Korea are nevertheless entitled to their service pay for the time they were prisoners. In so ruling in this case, the Court stressed the fact that the Army had cited no valid authority for withholding the pay.

The three petitioners behaved with what the Court calls "complete disloyalty" toward the United States during their incarceration in a Chinese Communist prison camp. After the armistice in Korea, they refused repatriation and went to Communist China. They were dishonorably discharged from the Army by administrative action in 1954, and in 1955 they returned to the United States. They filed claims for accrued pay and allowances from the time of their capture to the date of their discharge. When the Army denied the claims, they filed this action in the Court of Claims, which upheld the Army's position, one judge dissenting.

Mr. Justice Stewart reversed and remanded for the Supreme Court. The Court declared that a soldier's pay is a statutory right which can be taken from him only in accordance with prescribed procedures. By his enlistment, a soldier acquires a new status and although he may violate his enlistment contract his status remains unchanged, and he is entitled to the pay and allowances of his grade and status however ignoble a soldier he may be, the Court declared.

The Court rejected the argument that the Missing Persons Act provided authority for the Army's action here. That act "unambiguously provides that any person 'in the active service' . . . officially determined to be absent in a status of . . . captured by a hostile force . . . [is] entitled to receive or to have credited to his account the same . . . pay [and allowances] to which he was entitled at the beginning of such period of absence . . ." the Court said, and these petitioners fell under that specific category.

The Court refused to consider petitioner's right to pay after the time they refused repatriation and went to Communist China since that question had not been argued before them. The Court left this problem to the Court of Claims.

The case was argued by Robert E. Hannon for petitioners and by George S. Leonard for the United States.

Taxation . . .
accrual

United States v. *Consolidated Edison Company of New York, Inc.*, 366 U. S. 380, 6 L. ed. 2d 356, 81 S. Ct. 1326, 29 Law Week 4431. (No. 357, decided May 22, 1961.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

The issue in this case was whether certain contested municipal real estate taxes accrued, for federal income purposes, in the year the taxes were assessed and paid by the taxpayer to avoid seizure and sale of the property, or whether the taxes accrued in the year in which the state courts determined the validity of the state taxes.

The municipal taxes were levied upon hundreds of tracts owned by respondent during 1946 through 1950, and the amount in question was substantial, but the facts of the case were so complex that both parties stipulated a simplified example to be used for the purposes of the suit, as follows: In each of the years 1946 through 1950, respondent was notified of a tentative valuation of its property which, at the established rate, would produce a tax of $100. Respondent filed a bona fide protest stating a valuation that would produce a tax of $85. The city tax commission rejected this valuation, and, to avoid seizure and sale of its property, the respondent paid the $100 and immediately filed suit in the state supreme court admitting liability for $85 but denying liability for any amount in excess of that. In 1951, the state court ruled that the correct liability was $95 and the city forthwith returned $5 to respondent. On its federal income tax for each of the years 1946 through 1950, respondent accrued on its books and deducted the full $100. In 1951, when the real estate tax liability was settled, respondent failed to deduct the $10 from its gross income, but it did include the $5 refund in its gross income.

Respondent felt that this treatment of the $15 in 1951 was erroneous and resulted in its paying a lesser amount of federal income taxes in 1946 through 1950 and more in 1951 than it should have paid. In 1955, it filed this suit for a refund for that portion of its 1951 income taxes which re-

sulted from its failure to deduct the $10 of real estate tax that was determined to be due and its inclusion of the refunded $5. The District Court held that the payment of the tax in 1946 through 1950 accrued the item even though the payment was made under protest and even though litigation had been started within the taxable year to obtain repayment. On appeal, the Court of Appeals reversed, holding by a divided court that the part of the tax in dispute accrued in the year the contest in the state courts was finally settled.

The Supreme Court affirmed, speaking through Mr. Justice Whittaker. The Government contended that the remittance by respondent of the full $100 in real estate taxes from 1946 through 1950 amounted to a "payment" and "satisfaction" of both the disputed and undisputed parts of the assessment. Respondent, on the other hand, argued that its remittance to the city was not an admission of liability for the whole amount and that it did not constitute a payment or a settlement of the contested $15 portion which was, in effect, a mere deposit in the nature of a cash bond to avoid the risk of seizure and sale of the property. The Court declared that " 'Payment' is not a talismanic word" and it quoted with approval the Court of Appeals' declaration that "[w]hen the exact nature of the payment is not immediately ascertainable because it depends on some future event, such as the outcome of litigation, its treatment for income tax purposes must await that event". Of course unconditional payment by a taxpayer of an asserted matured tax liability is persuasive evidence that the item so paid and satisfied has accrued, the Court said, but where, as here, the remittance did not admit, but specifically denied, liability, it was in effect a mere deposit for the sole purpose of staying—in the only manner permitted by state law—an otherwise possible seizure and sale of the property. Accordingly, the Court ruled that $10 of the contested $15 liability accrued, not in the year of remittance, but in 1951, and that the $5 returned by the city in 1951 was not income to respondent in 1951.

The case was argued by Richard E. Gorman for petitioner and by Howard A. Heffron for the respondent.

Taxation . . . *alimony*

Commissioner of Internal Revenue v. *Lester*, 366 U. S. 299, 6 L. ed. 2d 306, 81 S. Ct. 1343, 29 Law Week 4455. (No. 376, decided May 22, 1961.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

At issue here was whether a portion of the petitioner's alimony payments to his divorced wife was paid for the support of his children so that it was not deductible from his gross income under Sections 22(k) and 23(u) of the 1939 Internal Revenue Code. The Court ruled that the payments were deductible.

The divorce agreement provided that

> [i]n the event that any of the [three] children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall . . . be reduced in a sum equal to one sixth of the payments which would thereafter otherwise accrue.

Both the Commissioner and the Tax Court ruled that this "sufficiently identified" one half of the periodic alimony payments as having been "payable for the support" of the petitioner's children under Section 22(k) so as not to be deductible by him under Section 23(u). The Court of Appeals reversed.

Mr. Justice Clark affirmed the holding of the Court of Appeals for the Supreme Court. The Court said that when Congress enacted Sections 22(k) and 23(u), it intended to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law. The Court said that the provisions represented the realization by Congress that increased surtax rates would intensify the hardship on the husband, who, in many cases would not have enough income left after paying his alimony to meet his income tax obligations. On the other hand, the wife, usually in a lower tax bracket, could protect herself in the divorce agreement and in the long run might receive a larger net payment from the husband if he could deduct the gross payment from his income. The Court noted that the legislative history of the statute indicated that Congress intended that the sums going to child support were to be included in the husband's gross income only if the amount was "specifically designated as a sum payable for support of minor children of the spouses". Here, the agreement did not specifically so provide, the Court went on, since it merely called for the payment of certain monies to the wife for the support of herself and the children. The statute does not say that "a sufficiently clear purpose" on the part of the parties makes the income attributable to the husband, the Court declared.

Mr. Justice Douglas wrote a concurring opinion which expressed agreement with the Court and expressed the opinion that the Government should not resort to litigation rather than to Congress to effect a change in the law.

The case was argued by C. Guy Tadlock for the petitioner and by Louis Mandel for respondent.

Taxation . . . *embezzled funds*

James v. *United States*, 366 U. S. 213, 6 L. ed. 2d 246, 81 S. Ct. 1052, 29 Law Week 4408. (No. 63, decided May 15, 1961.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed and remanded.*

In this case, the Court held that embezzled funds constituted income to the embezzler for federal income tax purposes. The doctrine of *Commissioner* v. *Wilcox*, 327 U. S. 404, decided fifteen years ago, was overturned, but the Court was unable to agree on a majority decision.

The petitioner was a union official who embezzled more than $738,000 from his union and from an insurance company from 1951 to 1954. He did not report these sums on his income tax returns and was convicted for wilfully attempting to evade his taxes. He was sentenced to a term of three years.

The Chief Justice announced the Court's judgment and a decision in which Mr. Justice Brennan and Mr. Justice Stewart concurred. The opinion announced the overruling of *Wilcox* and reversed petitioner's conviction and ordered dismissal of the indictment against him.

This opinion took the view that the *Wilcox* decision was "thoroughly devitalized" by *Rutkin* v. *United States*, 343 U. S. 130, decided six years later. That decision held that extorted money constitutes income to the extortioner. The opinion pointed out that the 1913 income tax act taxed income from "any *lawful* business", but that the word "lawful" had been omitted in a 1916 amendment. "This revealed, we think, the obvious intent of that Congress to tax income derived from both legal and illegal sources, to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune", the opinion said. "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent'", the opinion stated, quoting *North American Oil Co.* v. *Burnet*, 286 U. S. 417.

Mr. Justice Black, joined by Mr. Justice Douglas, wrote an opinion concurring in part and dissenting in part. This opinion took the position that the *Wilcox* case was correctly decided and should not be overruled; further, the opinion contended that *Wilcox* could be reconciled with *Rutkin*. The opinion argued that embezzled funds were not income because an embezzler acquires no title to what he takes. Subjecting the embezzled funds to a tax would amount to allowing the United States "a preferential claim for part of the dishonest gain, to the direct loss and detriment of those to whom it ought to be restored", the opinion declared, pointing out that here the amount taken was over $700,000 of which the Government claimed $559,000 in taxes. The opinion also argued that Congress had met regularly since the decision of *Wilcox* but had not seen fit to overrule that decision by legislation.

Mr. Justice Clark, concurring in part and dissenting in part, noted that he joined in overruling *Wilcox*, but that he would affirm the conviction because the petitioner had wilfully failed to report his correct income and, as he viewed the record, had placed no bona fide reliance on *Wilcox*.

Mr. Justice Harlan, joined by Mr. Justice Frankfurter, also concurring in part and dissenting in part, argued that the petitioner should be given a new trial to determine whether or not he placed bona fide reliance on *Wilcox*. In this view, the problem was how to overrule *Wilcox* in a manner that would not prejudice those who have relied upon it, and this could be done by remanding the case for a new trial to determine whether or not petitioner had placed bona fide reliance on that decision, the opinion declared.

Mr. Justice Whittaker, joined by Mr. Justice Black and Mr. Justice Douglas, concurring in part and dissenting in part, wrote an opinion which argued that the embezzled money was not income to the petitioner in the year in which it was taken—it was income to him in the year when he made an agreement with the union whereby, in exchange for releases fully discharging his indebtedness, he repaid to the union $13,568.50. Until that agreement was signed, this opinion contended, the petitioner and the union were in a clear debtor-creditor relationship. After the agreement, petitioner realized a taxable income to the extent of the difference between the amount taken and the sum restored.

The case was argued by Richard E. Gorman for the petitioner and by Howard A. Heffron for respondent.

The President's Page

(Continued from page 1049)

by the American Bar Association Endowment; to receive the benefit of the group disability insurance which has just been made available; to receive twelve issues of an outstanding legal publication, the *American Bar Association Journal*; to keep abreast of developments in legal circles through the *American Bar News* and the *Coordinator*; to have available the broad continuing legal education facilities and services of the Association, the American Law Institute and the Cromwell Library; to receive expert and specialized information and training through one or more of the Sections of the Association; to receive direct help in his own office through the Association's staff and committee work in the field of economics of law practice; to lend his personal support to the elimination of the unauthorized practice of the law by lay individuals and organizations which are encroaching upon the practice of law; and to participate in legislative activities which will benefit the public and the legal profession, including legislation such as the Jenkins-Keogh Bill.

In summary, I believe I reflect the attitude of the bulk of Americans when I expect every lawyer worthy of the name to be a member of the American Bar Association. Through his national organization, I expect him to work to improve his profession and, therefore, make more certain to me the justice I have come to expect as a heritage of democracy. Let all of us who are members, 102,678 strong, actively convince our 147,525 non-member brethren to join forces with us to achieve these goals. If you are willing to commit yourself to the large task of becoming a member of the Committee of 1,000, or of otherwise actively helping to increase our membership, write me at headquarters and I shall have sent to you the information you need.

What's New in the Law

The current product of courts, departments and agencies

George Rossman . EDITOR-IN-CHARGE

Richard B. Allen . ASSISTANT

Administrative Law . . .
segregation

Exercising its regulatory powers over interstate passenger carriers, the Interstate Commerce Commission has ordered that motor common carriers of passengers may not operate vehicles in interstate or foreign commerce "on which the seating of passengers is based upon race, color, creed, or national origin". The ruling applies to all carriers subject to Section 216 of the Interstate Commerce Act.

The order also applies to terminal and station facilities by providing that the companies shall not "provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, or follow any practice which includes the availability of, any terminal facilities which are so operated, arranged, or maintained as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed, or national origin". Carriers are instructed by the order to report interferences with the regulations within fifteen days.

The order directs carriers to post the regulations in terminals and to place the following notice in vehicles:

> Seating aboard this vehicle is without regard to race, color, creed or national origin, by order of the Interstate Commerce Commission.

The vehicle placards may be removed January 1, 1963, at which time a similar notice will be required on tickets.

(Discrimination in Operations of Interstate Motor Carrier of Passengers, Interstate Commerce Commission, September 22, 1961, Docket MC-C-3358.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Attorneys at Law . . .
contempt

The Court of Appeals for the Sixth Circuit has set aside a criminal contempt judgment against a Port Huron, Michigan, lawyer on the ground that the federal district judge who entered the contempt order was too personally involved to sit in judgment and that another judge should have decided the attorney's guilt.

The chain of circumstances leading to the contempt climax started when the federal district judge in Grand Rapids telephoned the lawyer to inquire why he had not sent the judge a brief he had requested from the lawyer or any response to his letter that briefs should be filed. There were some unpleasant exchanges during the conversation. Five days later the lawyer filed an affidavit of personal bias or prejudice against the judge, under 28 U.S. C.A. §144, alleging among other things that the judge was a close personal and political friend and a professional associate and fraternal brother of three defendants in the suit who were lawyers. At a subsequent hearing the judge, after analyzing the affidavit and holding it insufficient, started pointing out that the factual statements in it were not correct. At this point the lawyer, contending that the judge could not question the truth of the affidavit, walked out of the courtroom in defiance of the judge's instruction and refused to return. Acting pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, the judge cited the lawyer for contempt, held a hearing the following day and sentenced him to thirty days' imprisonment.

The Sixth Circuit turned to *Sacher* v. *U. S.*, 343 U. S. 1, where the Supreme Court upheld the right of the trial judge before whom the conduct occurred to adjudge and punish an attorney for contempt under Rule 42(a), and to *Offutt* v. *U. S.*, 348 U. S. 11, in which in a similar case the Supreme Court ruled that because of the personal nature of the controversy between the judge and the offending attorney the contempt proceedings should have been heard and decided by a different judge. The Sixth Circuit concluded that the present case was more like *Offutt,* embracing things of a personal nature to the judge, and that the contempt proceedings should be remanded for hearing by another judge.

(U. S. v. *Bradt,* United States Court of Appeals for the Sixth Circuit, September 25, 1961, Miller, J.)

Civil Procedure . . .
substituted service

Against a constitutional challenge, the Court of Appeals for the Fourth Circuit has upheld substituted service under North Carolina's non-resident motorist statute on a Texas resident whose automobile was operated in North Carolina by a sub-permitee.

The Texas owner purchased the car to be used by her minor son, a marine stationed in North Carolina. The son permitted a fellow marine to drive the car and he was involved in an accident resulting in a death. In a subsequent wrongful-death suit, the mother was served in accordance with the North Carolina statute. The insurer, which covered the automobile with a standard omnibus clause extending protection to anyone driving with permission of the insured, elected not to defend and judgment was obtained by default. The insurance company was sued later on its policy in a federal court diversity action.

Upholding the judgment, the Court ruled first that the North Carolina statute authorized substituted service of process on a non-resident owner of an automobile driven by a sub-permitee, and then concluded that so interpreted the statute did not violate due process constitutional concepts. The

Court declared that the due process clause imposed two requirements: first, that the statute authorizing jurisdiction must provide for the giving of adequate notice, and second, that the exercise of jurisdiction must be reasonable.

The Court noted that the first point was conceded because the Texas defendant had received notice of the suit. As to the second consideration, the Court said that it required an "analysis and weighing of the interests of a defendant in not being called upon to defend in the forum, of a plaintiff in being able to acquire jurisdiction over a defendant in the place where the cause of action arose, and of a state being able to open its courts to the particular lawsuit". It stated that the interest of the defendant in this case in not being inconvenienced by a lawsuit in North Carolina was much less than the interest of the plaintiff in trying the suit where the accident occurred and the witnesses resided. Too, the Court continued, the state in which an automobile accident occurs has a strong interest in opening its courts to an action arising from the accident. Thus weighing the factors, the Court concluded that North Carolina's exercise of jurisdiction was reasonable.

(Davis v. *St. Paul-Mercury Indemnity Company*, United States Court of Appeals for the Fourth Circuit, August 28, 1961, Sobeloff, C.J.)

Constitutional Law . . . *prayer in school*

The New York Regents' school prayer has now completed the gauntlet of New York courts and has survived a constitutional attack in the Court of Appeals of that state, with two judges dissenting. Previously it has weathered storms in the Supreme Court (191 N.Y.S. 2d 453—46 A.B.A.J. 89, January, 1960) and the Second Department Appellate Division (206 N.Y.S. 2d 183).

The prayer, recommended in 1951 and again in 1955 by the Board of Regents, which is the governing body of the New York State public school system, for use in schools is simple:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

The school involved in this case started using the prayer as a day-opening recitation in 1958, but with the policy that no child was to be required or encouraged to join in the prayer against his wishes. The daily use of the prayer was challenged as a violation of the First Amendment of the Federal Constitution, made applicable to the states by the Fourteenth Amendment, and of the New York Constitution provision that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind".

Chief Judge Desmond, announcing the decision of the Court, declared that a ruling that the saying of the Regents' prayer violated the First Amendment "would be in defiance of all American history, and such a holding would destroy a part of the essential foundation of the American governmental structure". He said that the prayer was no more than an acknowledgement of the existence of a Supreme Being, as is found in the federal and all state constitutions, and as is illustrated by the motto on our coins, daily prayers in Congress and provisions for chaplains in the Armed Forces. Recitation of the prayer, he continued, is not "religious education" nor the practice or establishment of religion. "The motives and purposes of the Regents and of the local board are noble", he concluded. "The success of the practice is problematical. But there is no problem of constitutionality."

In a separate concurring opinion, Judge Froessel wrote that the prayer "is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion". In another separate concurring opinion, Judge Burke charged that the "wall of separation" theory used by the dissenters really resulted in "an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion".

Judge Dye, writing for himself and the other dissenter, adverted to United States Supreme Court decisions and concluded: "Running through the fabric of these definitive decisions, like the pattern of a tree of life in an intricate tapestry, is a clearly defined line of demarcation between church and state, which may not be overstepped in the slightest degree in favor of either the church or the state. In such light, a board of education may not require the saying of the Regents' prayer as a daily school procedure."

(Engel v. *Vitale*, Court of Appeals of New York, July 7, 1961, Desmond, C.J., 10 N. Y. 2d 174, 218 N.Y.S. 2d 659.)

Criminal Law . . . *obscenity in private*

In two cases—one before the Court of Appeals for the Ninth Circuit and the other in the United States Court of Military Appeals—convictions have been sustained for sending obscene private letters in the mails.

In the Ninth Circuit case the conviction was for violation of 18 U.S.C.A. §1461 which declares "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . ." to be non-mailable and provides a penalty for knowingly using the mails for such material. The private letters on which the conviction was based were written by a writer and literary agent who claimed he did so as a part of a research project on lesbianism and homosexuality.

After holding that the letters came within the field of what has been described as "hard-core pornography" and that it was "inherently improbable" that they had anything to do with a serious research project, the Court turned to the defendant's claims that the statute did not reach private letters and that the standard of measuring obscenity in private letters should be their effect on the addressee rather than on the average person, as in the test posited by the United States Supreme Court in *Roth* v. *U. S.*, 354 U. S. 476.

The Court ruled that the statute applies to private letters by examining legislative history. It pointed out that the section included letters until 1955, when more general language was substituted, and that the purpose of the 1955 amendment was to enlarge the scope of the statute to include all matter of an obscene nature.

In considering the standards to be applied for determining obscenity, the Court refused to substitute a private-person concept for the average-person test. "We recognize, of course", it said, "that the potential harm to public dignity and morals is less in the case of the private letter than in the case of the commercial book or pamphlet because the addressee of the letter is generally the only one likely to see it. Gravity of harm has, however, been rejected by the Supreme Court in obscenity cases, *Roth, supra,* under the theory that obscenity is so anti-social and devoid of any social value, that it is outside the First Amendment area of protection. That being so, we believe the test evolved in *Roth* remains the same to be applied under these facts as well."

(Ackerman v. *U. S.*, United States Court of Appeals for the Ninth Circuit, August 18, 1961, Sweigert, J.)

In the Court of Military Appeals case the Court was reviewing a conviction of a 31-year-old soldier under Article 67(b)(2) of the Uniform Code of Military Justice for writing obscene and lewd letters to a 13-year-old girl with whom he was purportedly in love. As their point of reference for the criminal nature of the act, the Government and the accused used 18 U.S.C.A. §1461.

As in the other case, the defendant lost his contention that a private letter is not included within the statute. The Court, looking at the letters, held they were lewd and obscene and manifestly appealed to lust and licentiousness, whether measured by the "average person" in the contemporary community, the "average" 13-year-old girl, or the particular recipient involved in the case.

The Court also rejected the accused's argument that private letters between two persons with a close relationship—as lovers—are not "matter" within the meaning of the statute. The Court could find no case support for this position. "We conclude, therefore", it said, "that although the accused and Sandra were lovers, the relationship did not take the letter[s] out of the operation of the statute."

(U. S. v. *Holt*, United States Court of Military Appeals, July 28, 1961, Quinn, C.J., 12 U.S.C.M.A. 471.)

Criminal Procedure . . . *appointment of counsel*

A convicted Connecticut murderer with a death sentence has been turned down by the Court of Appeals for the Second Circuit in a bid for a new trial by means of a federal court *habeas corpus* writ.

The petitioner, a 19-year-old of "dull-normal" intelligence, was convicted of a hammer-murder and he exhausted his state remedies by appealing to the Connecticut Supreme Court of Errors. He was apprehended by the police at about 9 P.M.—twenty-four hours after the crime—and arraigned in police court the following morning. During the night, however, he signed a confession. On the day of the arraignment he made another confession and took the police on a tour of his movements on the day of the crime. The following day he took them to the place he had discarded the hammer.

At none of these times had counsel been furnished to the petitioner, nor had he consulted anyone other than his wife. He first conferred with an attorney about six weeks later on the day he was called before the grand jury. The public defender and later a special defender were appointed to defend him more than two months before the trial. At the trial, the petitioner's counsel did not object to use of the confessions and the petitioner testified substantially in accord with the second confession.

The district judge granted the writ of *habeas corpus* unless he was re-tried in a reasonable time on the ground that "in a capital case involving one of [the petitioner's] age, mentality and schooling, provision of counsel was necessary at least as soon as the formal accusation of murder was made in the police court and that the use of the statements elicited from him thereafter while kept in ignorance of his rights made the trial fundamentally unfair".

The Second Circuit, however, while noting that the right to counsel in capital cases is "absolute", ruled that a pre-trial failure to assign counsel in a capital case should not be grounds for vacating the conviction unless the failure resulted in fundamental unfairness at the trial, and it went on to conclude that there was no fundamental unfairness in this case. The Court pointed out that the special public defender had been appointed in ample time before the trial and had employed an "understandable strategy" at the trial of soliciting the jury's sympathy through frankness so that life imprisonment would be recommended. "The trial strategy had much to commend it", the Court said. "That it failed does not mean that it was mistaken. . . . Regrettable as hindsight may prove the choice to have been, [the petitioner] must be bound by what his lawyers did and his acquiescence in that course by his own testimony."

The Court conceded that *Spano* v. *New York*, 360 U. S. 315, might stand for the rule that a state conviction of a capital offense must be set aside if the state uses a confession obtained at a "time when the accused should have been permitted to consult with counsel". But, it said, the confession in *Spano* was used over objection, whereas in this case there had been no objection. "At every trial points are contested and conceded; when they are conceded they must be considered to be binding", it declared.

One judge dissented, agreeing with the conclusions of the district judge.

(U. S. ex rel. Reid v. *Richmond*, United States Court of Appeals for the Second Circuit, September 19, 1961, Lumbard, C.J.)

Federal Taxation . . . *medical expenses*

The Court of Appeals for the Second Circuit has split with the Third Circuit on the question whether the expense of meals and lodging incurred on a trip concededly taken for medical reasons may be claimed as medical deductions.

This year in *Commissioner* v. *Bilder*, 289 F. 2d 291, the Third Circuit, with one judge dissenting, permitted the deduction of amounts spent for lodgings in Florida, as well as transportation, as medical expenses. In the Second Circuit case at bar, the Commissioner disallowed hotel and meal expenses on a Bermuda trip under-

taken solely for medical reasons, but allowed the cost of transportation.

Examining both the 1939 Internal Revenue Code, under which meals and lodging were deductible, and the 1954 Code, the Second Circuit conceded that the answer was not clear. But it turned to the legislative history gleanable from committee reports from both houses of Congress, and there it found statements that the 1954 Code "specifically excludes deduction of any meals and lodging while away from home receiving medical treatment". Thus, the Court concluded, "it is abundantly clear that Congress intended, by changing §213 of the 1954 Code, to prohibit deductions of the kind now at issue before us".

(Carasso v. *Commissioner,* Court of Appeals for the Second Circuit, July 14, 1961, Dawson, J.)

Municipalities . . .
anti-solicitation ordinance

A Chicago suburb's broadly drawn ordinance prohibiting fund drives and charitable campaigns has been struck down as unconstitutional by the Court of Appeals for the Seventh Circuit.

The ordinance provided that "[n]o person, firm or corporation, charitable or otherwise, shall hereafter beg, collect, solicit, conduct any campaign or conduct what is commonly known as a 'tag day' . . . for the purpose of obtaining funds for charitable purposes without first having obtained the consent of the city council." Exceptions were made for the community chest and one poppy day. The ordinance was challenged by the Chicago Heart Association and several of its members under the Civil Rights Act, 42 U.S.C.A. §1983, in a suit joining the city, city officials and members of the city council as defendants.

The city contended that the ordinance did nothing more than retain responsibility for the supervision of fund-raising campaigns in the city council through the power to issue or deny a canvasser's permit. This, it said, was a legislative function, the validity of which would depend on whether the judgment as exercised is arbitrary or has some reasonable basis.

Not so, the Court answered, relying on the Supreme Court's decision in *Staub* v. *City of Baxley,* 355 U. S. 313. The ordinance did not contain any "definitive standards or other controlling guides governing the action of the city council in granting or withholding a permit", the Court pointed out, and thus it made enjoyment of the right of free speech contingent on the will of the city council and imposed an unconstitutional prior restraint on a protected constitutional right. The Court declared, moreover, that "it is obvious that the exemption of the community chest by name constitutes a deprivation of the equal protection of the laws".

Preliminarily, the Court had to decide two procedural questions. It ruled, first, that a municipal corporation may be subject to a suit under 42 U.S.C.A. §1983, if the remedy sought by the action is a declaratory judgment and injunction, as here, rather than damages, as in *Monroe* v. *Pape,* 365 U. S. 167, in which the Supreme Court said that a city was not within the ambit of §1983. Secondly, the Court concluded that the term "other person" in §1983 included a corporation and that the Heart Association was a proper party plaintiff.

(Adams v. *City of Park Ridge,* United States Court of Appeals for the Seventh Circuit, August 21, 1961, Schnackenberg, J.)

Negligence . . .
imputation

Re-examining the doctrine of imputation of negligence, the Supreme Court of Minnesota has refused to impute the possible negligence of a fire department driver to the assistant fire chief riding in the car with the driver.

The fireman-driver and the assistant chief were on the way to investigate a fire when they were involved in an intersection collision in which the driver was killed. His estate and the assistant chief, who had been injured, sued the other driver, but the jury returned a not guilty after being instructed that any negligence of the fireman-driver must be imputed to the assistant chief. The trial judge concluded later, however, that the instruction was erroneous and granted new trials to both.

Affirming, the Court noted that there was no dispute that the assistant chief exercised direction and command over the fireman-driver, but it declared that the correct rule is that the negligence of a driver of an automobile is not imputable to a fellow employee riding with him, even though he has the right to control the operation of the vehicle, in the absence of a relationship which would establish vicarious liability. The Court pointed out both Prosser and the *Restatement of Torts* propose this test for imputing negligence. Using this principle, the Court continued, the assistant chief could not have the driver's negligence imputed to him because there was no master-servant or *respondeat superior* relationship to support vicarious liability.

While the right to control the operation of the car did not of itself establish a basis for imputation of negligence, the Court warned that it would have a vital bearing on the determination of the independent negligence of the assistant chief. "Failure to exercise a control which he has, when it should have been exercised, may well constitute negligence on the part of the passenger, as well as other affirmative acts or failure to act when reasonable prudence would require it", the Court said.

(Nadeau v. *Melin,* Supreme Court of Minnesota, June 30, 1961, Knutson, J., 110 N.W. 2d 29.)

Activities of Sections

James B. Donovan

SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW

The officers for 1961-1962 of the Section of Insurance, Negligence and Compensation Law are Chairman, James B. Donovan, New York, New York; Chairman-Elect, J. Roth Crabbe, Columbus, Ohio; Vice Chairman, Wayne E. Stichter, Toledo, Ohio; and Secretary, Lowell D. Snorf, Jr., Chicago, Illinois.

Chairman Donovan is a graduate of Fordham College and Harvard Law School; formerly Associate General Counsel, United States Office of Scientific Research and Development; General Counsel, Office of Strategic Services; and associate prosecutor, Nuremberg war criminals trials.

Chairman-Elect Crabbe is a former Superintendent of Insurance of the State of Ohio.

The theme of the Section's 1962 Annual Meeting in San Francisco will be "What Every Practicing Lawyer Should Know About the Business of Insurance". As planned, the program contemplates a series of presentations by outstanding technical personnel, designed to impart a working knowledge of all lines of insurance. Papers delivered will be in greater detail, including bibliographies, and will be available for distribution.

As part of its 1961-1962 activities, the Section will make available to state and municipal bar associations upon request the advice and assistance of and guest speakers from the Section's committees on specialty lines of insurance.

SECTION OF JUDICIAL ADMINISTRATION

At the annual meeting of the Section of Judicial Administration, Chief United States District Judge Joe Ewing Estes, of Dallas, Texas, was elected Chairman, succeeding Judge Philbrick McCoy, of Los Angeles. Judge Estes, who presides over the United States District Court for the Northern District of Texas, served during the year just passed as First Vice Chairman of the Section. He is a native Texan, a graduate of the University of Texas School of Law, and a member of the Committee on Pre-Trial of the Judicial Conference of the United States.

Joe Ewing Estes

Other officers elected were Judge Ivan Lee Holt, Jr., First Vice Chairman; Judge Thomas M. Powers, Second Vice Chairman; Chief Justice John R. Dethmers, Third Vice Chairman; Chief Justice Paul C. Reardon, Fourth Vice Chairman; C. Frank Reifsnyder, Secretary; and Miss Alice L. O'Donnell, Assistant Secretary.

Members of the Council serving unexpired terms are William J. Brennan, Jr., Edward J. Dimock, Stanley N. Barnes, William J. Jameson, John M. Lynham and Edward B. McConnell. David W. Peck was elected to another term on the Council, and Chief Justice William M. McAllister, of Oregon, was elected as a new member. Judge Stephen Chandler, former Section Chairman, will continue to serve as Delegate to the House of Delegates.

Highlighting the year's activities was the publication of the Section Handbook on the Administration of Justice. Worthy of note among the events of the meeting was the "Law and the Layman Conference" program, "A Real Case of Murder" featuring an open discussion of the controversial CBS television film of the same name.

Bernard A. Foster, Jr.

SECTION OF MINERAL AND NATURAL RESOURCES LAW

The 1961 meeting of the Section of Mineral and Natural Resources Law focused timely attention on the "Effectiveness of the Administrative Process" and "A National Fuels Policy". Interest was generated through panel techniques, with resulting spirited audience participation.

Former Federal Power Commissioner William R. Connole presided over the first panel, composed of John C. Mason, Federal Power Commission General Counsel; Cecil E. Munn, Fort Worth lawyer; and William H. Tarver, General Counsel of the Southern Natural Gas Company. Moderating the second panel was John W. Boatwright, Washington consultant. Panelists were: Hamilton K. Beebe, for the coal interests; General K. D. Nichols, former General Manager of the Atomic Energy Commission; David T. Searls, Houston lawyer; and W. E. Wilson, of the United Gas Pipeline Company.

The session also heard a learned discussion of "Recent Developments in the Law of Oil and Gas" by Kenneth Woodward, Professor of Law at the University of Texas.

Program streamlining and maintenance of high interest level were facilitated through printing and distribution, in advance of the Annual meeting, of regular committee reports in their usual comprehensive and annotated form. This practice will be continued. The 1962 San Francisco meeting will expand attention to matters concerning hard minerals, water rights, and timber and vegetative resources.

Newly elected officers include: Chairman, Bernard A. Foster, Jr., Washington, D. C.; Chairman-Elect, Howard A. Twitty, Phoenix, Arizona; Vice Chairman, A. W. Walker, Jr., Dallas, Texas; Secretary, James D. Parriott, Findlay, Ohio; Council members for terms ending in 1965, Gordon R. Carpenter, Dallas, Texas; and Jesse P. Luton, Houston, Texas.

SECTION OF TAXATION

The Twenty-Second Annual Meeting of the Section of Taxation headed by Chairman William R. Spofford, of Philadelphia, was held in St. Louis August 3 through 8.

After the meetings of the officers and Council on August 3 and the Council and committee chairmen on August 4, three days were devoted primarily to committee reports and proposed legislation.

Thirteen recommendations for legislation or changes in regulations proposed by committees of the Section were approved by the Section.

At a luncheon session on Saturday, August 5, an address was delivered by Mortimer M. Caplin, Commissioner of Internal Revenue, on "Current Trends in Tax Administration". At a luncheon meeting the following day, Stanley S. Surrey, Assistant Secretary of the Treasury, spoke on "Current Tax Problems". Both of these speeches were of wide interest and will be published in future issues of the Section's *Bulletin*.

Randolph W. Thrower

Two technical sessions of the Section were held during the Annual Meeting. On the morning of August 8, Donald McDonald, of Philadelphia, was moderator of a panel discussion on "The Use and Abuse of Associations Taxable as Corporations". The panel reviewed the Treasury Department's final regulations on this subject and operations thereunder in various areas. The panelists were Donald C. Alexander, of Cincinnati; Joseph P. Driscoll, of Dallas; E. Charles Eichenbaum, of Little Rock; Arthur A. Feder, of New York; and James O. Hewitt, of San Diego.

On the afternoon of the same day Allen H. Gardner, of Washington, presided over a session devoted to state and local taxes. The subject discussed was "Drafting a Federal Statute to Govern the State Taxation of Interstate Commerce". Donald K. Barnes, of Detroit, presented an outline of such a federal statute, following which specific proposals in various tax areas were made by J. Patrick Kittler, of Minneapolis; Davis W. Morton, Jr., of Washington; Arthur B. Barber, of Madison; Nicholas J. Rini, of Detroit; and John Izard, of Atlanta. Thereafter a panel composed of Richard L. Hirshberg, of Washington; Ben F. Johnson, of Atlanta; Arthur D. Lynn, Jr., of Columbus; Dixwell L. Pierce, of Sacramento; and Jess N. Rosenberg, of San Francisco, interrogated the speakers and commented on the several proposals.

The Section elected the following officers for the current year: Randolph W. Thrower, of Atlanta, Chairman; Andrew B. Young, of Philadelphia, Vice Chairman; and Darrell D. Wiles, of St. Louis, Secretary.

The following were elected Council members for three-year terms: F. Cleveland Hedrick, Jr., of Washington; Clifford L. Porter, of New York; and Meade Whitaker, of Birmingham. Lee I. Park, of Washington, continues as Section Delegate to the House of Delegates.

Proceedings of the Assembly:

St. Louis, Missouri, August 7-11, 1961

The Assembly of the American Bar Association is composed of all members of the Association who register for an Annual Meeting. During the 84th Annual Meeting in St. Louis last August, there were five sessions of the Assembly, which were heavily attended by the 4,155 members registered.

First Session

THE FIRST session of the Assembly convened at 10:10 A.M. on Monday, August 7, with President Whitney North Seymour, of New York City, in the chair. The meeting was held in the Opera House, Kiel Auditorium.

Following the call to the colors and the singing of the National Anthem, the invocation was pronounced by His Eminence, Joseph Cardinal Ritter, Archbishop of St. Louis.

The address of welcome was delivered by John M. Dalton, Governor of Missouri, and the response was given by W. St. John Garwood, of Austin, Texas.

President Seymour introduced the members and guests seated on the platform, and resolutions were received for consideration by the Resolutions Committee.

The following were nominated for Assembly Delegate: William C. Farrer, of Los Angeles; Ronald J. Foulis, of Washington, D. C.; R. Carleton Sharretts, Jr., of Baltimore; Samuel H. Liberman, of St. Louis; Churchill Rodgers, of New York City; Paul Carrington, of Dallas; Joseph A. McLain, Jr., of Tampa; John P. Bracken, of Philadelphia; and Arthur J. Freund, of St. Louis.

Timothy W. Swain, of Peoria, Illinois, Chairman of the Section of Bar Activities, then presented awards of merit for excellent programs sponsored by bar associations during the past year. The following associations won awards: the Louisiana State Bar Association; the North Carolina Bar Association; the Bar Association of St. Louis; the Bucks County Bar Association (Pennsylvania); and the San Gabriel Bar Association (California). Honorable mention went to the Florida Bar; the Arkansas Bar Association; the Bar Association of Puerto Rico; the Dade County Bar Association (Florida); and the Des Moines County Bar Association (Iowa).

Mr. Seymour read a telegram of greeting from President Kennedy, and then delivered the Annual Address of the President, which was published in full in the September issue of the *Journal* (47 A.B.A.J. 861).

Albert H. Houghton, of Milwaukee, Chairman of the Committee on Traffic Court Program, announced the following awards to communities showing the greatest improvement in their traffic courts during the past year: Dade County, Florida; Kansas City, Missouri; Denver; Toledo; Oklahoma City; Arlington, Virginia; Greensboro, North Carolina; Springfield, Ohio; Warren, Ohio; Lake Charles, Louisiana; Royal Oak, Michigan; Springfield, Missouri; East Lansing, Michigan; Kinley, Ohio; Keokuk, Iowa; Albert Lea, Minnesota; and Ravenna, Ohio. Honorable mention awards were given to Houston; Portland, Oregon; Fort Worth; Tampa; Wichita; Albuquerque; Norfolk, Virginia; Montgomery, Alabama; Berkeley, California; Kansas City, Kansas; Corpus Christi; Lubbock, Texas; Kalamazoo; Cleveland Heights, Ohio; Euclid, Ohio; Ogden, Utah; Eugene, Oregon; Columbia, South Carolina; Park Forest, Illinois; East Cleveland, Ohio; Oak Ridge, Tennessee; Garden City, Michigan; Holland, Michigan; and Bemidji, Minnesota.

The Assembly recessed at 11:45 A.M.

Second Session

The Assembly met in the Khorassan Room of the Hotel Chase for its second session. The meeting began at 2:15 P.M. on Wednesday, August 9, with President Whitney North Seymour presiding.

Rabbi Ferdinand M. Isserman, of Congregation Temple Israel, St. Louis, pronounced the invocation.

Kenton Cravens, representing the American Heritage Foundation, presented the Association with the Foundation's Outstanding Achievement Award for the work with naturalized citizens and in the field of election reform.

Mr. Seymour presented a plaque to William C. Golden, of Washington, D. C., the one hundred thousandth member to join the American Bar Association.

Judge Vivian Bose, of India, the President of the International Commission of Jurists, Donald McInnes, Q.C., President of the Canadian Bar Association, and Sir Leslie Knox Munro, of New Zealand, Secretary-General of the International Commission of Jurists, delivered the addresses of the afternoon.

The session ended at 4:30 P.M.

Third Session

The third session of the Assembly, also held in the Khorassan Room of the Hotel Chase, convened at 2:08

P.M. on Thursday, August 10, the President presiding.

The invocation was given by the Rev. Raymond McCallister, Pastor of Webster Groves Christian Church in St. Louis.

Professor Robert B. McCay, of the New York University Law School, read a résumé of his prize-winning essay in the 1961 Ross Essay Contest and was presented with the prize, a scroll and a check for $3,000. The entire essay was published in the September issue of the *Journal* (47 A.B.A.J. 890). The President announced the subject of the next Ross Essay Contest, "How May the Disposition of Personal Injury Litigation Be Improved?"

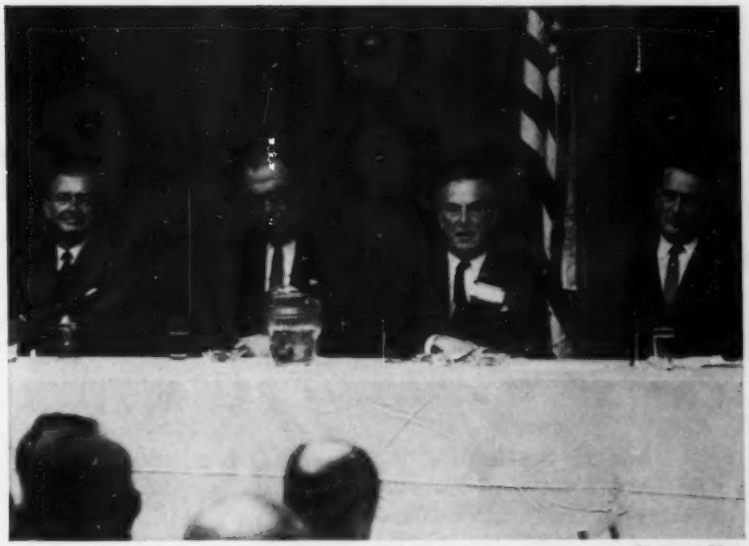
The address of the afternoon was delivered by Mr. Justice Whittaker, of the Supreme Court of the United States (see page 1087).

The Assembly voted by more than the necessary two-thirds vote to approve the proposed amendments to the Constitution and By-Laws of the Association in the form already approved by the House of Delegates (see page 1024, October, 1961, issue).

George H. Turner, of Lincoln, Nebraska, the Chairman of the Resolutions Committee, reported that five resolutions had been offered at the opening session. These had been considered at length by his Committee after hearings, he said.

The first, submitted by Chauncey P. Carter, of Washington, D. C., recommended, since trademark law has little to do with patent or copyright law, that jurisdiction over this field be given to an Association section dealing with the law of unfair competition. The Committee recommended that this be referred to the Committee on Scope and Correlation of Work without recommendation as to its merits. On Mr. Turner's motion, the Assembly voted to follow the Committee's recommendation.

Resolution No. 2, submitted by Dorothy Frooks, of New York City, recommended that a committee be appointed to study the feasibility of the establishment of labor courts to assume jurisdiction over all labor disputes. The recommendation of the Resolutions Committee was that this resolution be not adopted.



Grauman Marx

Four distinguished Speakers at the 1961 Annual Meeting in St. Louis —(left to right) Donald McInnes, Q.C., President of the Canadian Bar Association; Sir Leslie Knox Munro, Secretary-General of the International Commission of Jurists; the Right Honorable Lord Evershed, of London, Master of the Rolls; and Mr. Justice Whittaker, of the Supreme Court of the United States.

Miss Frooks objected to this disposition of her resolution. She declared that of the five resolutions submitted to the Committee, four had been published in the *St. Louis Daily Record*, while hers had not been published. She read the resolution in full and moved that it be referred to a special committee for study.

The President ruled that this motion was not in order because Mr. Turner's motion that the resolution be not adopted was already before the Assembly, and Miss Frooks' motion was merely the contrary of that.

In reply to a question put by C. Waldo Haines, of Atlanta, Mr. Turner explained that the Resolutions Committee felt that the resolution was not within the scope of the purposes of the Association.

President Seymour said that he understood the resolution to assume the desirability of a labor court.

John F. X. Browne, of Far Rockaway, New York, protested that he did not interpret the resolution as the Chair had; all it asked was the appointment of a committee, he asserted.

On motion of Paul Carrington, of Dallas, Texas, the Assembly finally voted to refer the resolution to the Section of Labor Relations Law.

The third resolution, introduced by Mr. Browne, recommended that a special committee be appointed on membership representation in the House of Delegates. On recommendation of the Resolutions Committee, the Assembly voted to refer this resolution to the Special Committee To Study the Association's Constitution and By-Laws, without recommendation as to its merits.

The fourth resolution, submitted by Sherwood M. Snyder, of Rochester, New York, called for legal assistance by the United States to the governments of newly formed countries for the purpose of helping them draft social legislation. The Resolutions Committee recommended that this be not adopted.

In support of the resolution, Mr. Browne said that the United States was giving financial, military and technical assistance to the new nations, while there was no program of legal assistance. The Association stands for order in society, he declared, and we have an obligation to "stir our Government" so that it will create a positive program

to offer legal help to the new underdeveloped nations.

The Assembly then voted, and the recommendation of the Resolutions Committee not to adopt the resolution was carried.

Resolution No. 5, relating to functions which state and local bar associations are urged to carry out in areas where vacancies in federal courts exist, was adopted. This resolution is published in full on page 1044 of the October, 1961, issue of the *Journal*.

The meeting then recessed at 4:20 P.M.

Fourth Session

The fourth session of the Assembly was the Annual Dinner, the traditional highlight of the Annual Meeting of the Association. The dinner was held in the Khorassan Room of the Hotel Chase, beginning at 9:30 P.M. on Thursday, August 10, the President presiding.

The invocation was pronounced by the Very Reverend Ned Cole, Dean of Christ Church Cathedral (Episcopal).

After the dinner, President Seymour introduced the distinguished guests at the speakers' table.

The American Bar Association Medal, the highest honor conferred by the Association, was presented to Jacob M. Lashly, of St. Louis, for "conspicuous service to the cause of American jurisprudence".

The address of the evening was delivered by the Right Honorable Lord Evershed, Master of the Rolls.

The President then made the presentation of the annual gavel awards. This year's awards went to the *Hartford Times*, the *Christian Science Monitor*, the *Chicago Tribune*, the Armstrong Circle Theatre, the University of Michigan Television Center, CBS Reports, and Radio Station KMOX, St. Louis.

Honorary memberships in the Association were presented to Judge Bose, of India, Donald McInnes, Q.C., of Canada, Sir Leslie Munro, of New Zealand, and Dr. Carlos Arosemena Arias, of Panama City, Republic of Panama.

Mr. Seymour then introduced the new President of the Association, John C. Satterfield, of Yazoo City, Mississippi, who spoke briefly.

The dinner adjourned at 10:35 P.M.

Fifth Session

The fifth and final session of the Assembly was held in the Hotel Chase at 9:47 A.M. on Friday, August 11, the President presiding.

Following the introduction of the new officers and members of the Board of Governors, Mr. Seymour turned the gavel over to Mr. Satterfield, and the meeting adjourned at 9:52 A.M.

OUR YOUNGER LAWYERS

John G. Weinmann, New Orleans, Louisiana, Secretary,
Junior Bar Conference, Editor

Résumé of Officers' and Directors' Meeting

Kenneth J. Burns, Jr., of Chicago, Chairman of the Junior Bar Conference, held a meeting of the Conference's officers and directors at the American Bar Center in Chicago on September 30-October 1. The work of the Conference and committee assignments for the coming year were reviewed. Present at the meeting, in addition to Chairman Burns, were Vice Chairman James R. Stoner, of Washington, D. C.; Secretary John G. Weinmann, of New Orleans; Speaker of the Conference Assembly Wayne L. Millsap, of St. Louis, and the four directors, Edwin S. Rockefeller, of Washington, D. C.; Robert S. Mucklestone, of Seattle; Lewis H. Hill III, of Tampa; and Richards D. Barger, of Los Angeles. Also present were William F. Able, Administrative Assistant, and the following committee chairmen: John C. Feirich, of Carbondale, Illinois; John J. Thomason, of Memphis, Tennessee; Francis J. Demet, of Milwaukee, Wisconsin; and Alan R. Waterstone, of Detroit, Michigan. Joseph D. Stecher, Executive Director of the American Bar Association, James Spiro, Director of Activities, and John Keefe, of the Association's Coordination Service, were also present to discuss plans and activities pertinent to Conference activities this year.

Chairman Burns reported the completion of most of his committee appointments and commented upon his

Seated from left to right: Elizabeth Murley, Headquarters Secretary; John G. Weinmann; Kenneth J. Burns, Jr.; James R. Stoner; William F. Able. Standing left to right: John J. Thomason; John C. Feirich; Richards D. Barger; Edwin S. Rockefeller; Wayne L. Millsap; Walter Franklin Sheble; Alan R. Waterstone and Lewis H. Hill, III.

trips to the Canadian Junior Bar meeting in Winnepeg, and the Washington and Indiana State Junior Bar meetings held in Seattle and French Lick, respectively. He noted the success of recent exchange meetings held by the Seattle and Vancouver Junior Bar groups and expressed the hope that similar exchange meetings could be held by Junior Bar groups in other cities located close to the United States-Canadian border. The Conference is fortunate in securing a number of outstanding and experienced men to serve as advisers to various Junior Bar Conference committees. Advisers include Arthur Larson for World Peace Through Law, F. Trowbridge vom Baur for Unauthorized Practice of Law, Admiral William C. Mott for Military Services, Lewis Powell for the Special Committee on Education in the Contrast Between Liberty Under Law and Communism, Professors William Trumbull and Howard Sacks of Northwestern University Law School for Clients' Security Funds and Professional Responsibility, respectively, Kline Strong for Economics of the Profession, John Mulder for Continuing Legal Education, Glenn Winters for Court Improvement, John Keefe for Surveys, and Don Hyndman for Law Day. Charles Gonthier, the new chairman of the Canadian Junior Bar, is the adviser to the committee on that subject. Experienced Conference members round out the list of advisers, such as Harvey Chappell, Jr. for Law and Medicine, John J. Thomason for Awards, Paul Orth for Pre-Practice Orientation, David Peshkin for Membership, Lowell Beck for Legislation, Richards Barger for the Annual Meeting, Robert Richardson for Regional Meetings, William Cogar for Affiliation, and Ewell Murphy for Inter-American Bar.

From the left, Eldon Reiley, of Spokane, and Robert S. Mucklestone, of Seattle, accept Certificates of Affiliation with the Junior Bar Conference from Mr. Burns, in behalf of the Spokane County Barrister Council and the Junior Bar Committee of the Washington State Bar Association, respectively.

Secretary Weinmann reported on the Section Delegates election. Following the completion of the Annual Meeting of the Conference in St. Louis, the House of Delegates of the Association, also meeting in St. Louis, voted to increase the number of Section Delegates of the Conference from one to three delegates. Robert R. Richardson, of Atlanta, will complete the two-year term in the House to which he was elected in 1960. The two remaining positions were filled by mail ballot by the Executive Council of the Conference. Elected for two-year terms each were William Reece Smith, Jr., of Tampa, and Walter Franklin Sheble, of Washington, D. C.

James Spiro, Director of Activities of the Association, discussed in some detail the current work of the Association relative to Lawyer Placement. He stated that the committee in charge of this program is studying possible ways to make this program an effective service to members of the Association. He estimated that as many as 8,000 attorneys may be interested in the program. He requested that the Conference Committee on the Young Government Lawyer, headed by Richard Berryman, of Washington, D. C., present to the Lawyer Placement Committee the details of the Lawyer Placement Program successfully initiated by the Conference in Washington, D. C., in 1960.

Director Barger reviewed plans for the 1962 Annual Meeting to be held in San Francisco. The Palace Hotel will be headquarters for the Junior Bar Conference, while the headquarters hotel for the Association will be the Fairmont Hotel. Chairman of the Annual Meeting Committee is Quentin L. Kopp, of San Francisco. Serving as the Vice Chairmen are Edward E.

Kallgren, Robert S. Daggett, Hartly Fleischmann and Donald M. Cahen, all of San Francisco.

Alan R. Waterstone, of Detroit, Chairman of the Committee on Awards of Achievement, suggested that the rules of his committee be amended so as to increase the number of awards to four. At present entries for the awards are classified as state junior bars, junior bar groups in cities having a population of 500,000 or less, and junior bar groups in cities having a population over 500,000. Mr. Waterstone recommended a new award to cover state junior bar groups in states having smaller populations. He also asked that consideration be given to the presentation of a money award and to the simplification of the rules governing award entries. Chairman Burns requested that the Awards Committee cover these various points in a report to be made to the Executive Council of the Conference at its mid-winter meeting in Chicago in February.

Mr. Feirich, Chairman of the Committee on Court Improvement, reported that last year this committee, working with the Association's Committee on Court Congestion, published a handbook relating to judicial administration. The Handbook is being used by the Committee to encourage state conferences to improve judicial administration. He also said that the State of Alabama is interested in undertaking a statewide court improvement program to be supervised by this joint committee. In accordance with the resolution of the Conference Assembly, adopted in St. Louis, the proposal for a model code of judicial retirement and disability which establishes standards is being submitted to the Section of Judicial Administration for approval. If the resolution is approved, the approval of the Board of Governors and then of the House of Delegates of the Association will be sought. After full approval, state judicial councils will be sent copies for information and the proposal will be referred to the Conference of Commissioners on Uniform State Laws.

This year, the Committee on Affiliation, headed by E. William Henry, of Memphis, will give attention to new affiliate units in the Rocky Mountain area. Chairman Burns stated that committee personnel should make every effort to encourage Junior Bar participation in the regional meeting in Salt Lake City May 31-June 2, 1962.

The By-Laws of the Conference and Rules of Procedure of the Conference Assembly were reviewed. A proposal for a new by-law to provide for the method of election of the three Section Delegates is to be prepared by George T. Roumell, of Detroit, Michigan, Chairman of the By-Laws Committee, for consideration by the Executive Council in Chicago in February and subsequent vote by the general membership in San Francisco in August. George C. Winn, of Tampa, Florida, Clerk of the Conference Assembly, is preparing a complete revision of the Assembly Rules of Procedure.

Francis J. Demet, of Milwaukee, Chairman of the Committee on Clients' Security Funds, stated that his Committee is in the process of preparing a report of the arguments for and against these funds. His Committee also intends to recommend to the Conference what position the Conference should take with regard to Clients' Security Funds. Serving as Vice Chairmen of this committee are Ralph W. Brenner, of Philadelphia, and Anthony J. Mansour, of Flint.

State and Local Bar News

The Directors of the State Junior Bar of Texas met at San Angelo, Texas, on September 15 and 16. Among the most important projects outlined for the current Conference year were the passage of a small loan bill at a special session of the legislature, increased presentation of the "Trial by Jury-USA" program to high school students and strengthening of local junior bar groups. Plans were made to encourage every law school of Texas to participate in Moot Court Competition and to assist in the preparation of the problem and rules for the competition.

In August, the Young Lawyers' Conference of South Carolina held a luncheon for the new admittees to the South Carolina Bar. Among those attending were the five state supreme court justices, a United States district judge and the dean of the state law school. Glen E. Craig, President of the South Carolina junior bar group, stated that almost 40 per cent of the new admittees joined the American Bar Association.

The Junior Bar Section of the District of Columbia began its fifteenth year of publication of *The District of Columbia Young Lawyer* in October. Editor Bob Stranahan and his staff keep the Section members abreast of current and coming Junior Bar activities including official announcements and news of national activities.

Past National Chairman Appears Before Senate Committee

William Reece Smith, Jr., immediate past national chairman, testified before the Finance Committee of the United States Senate in July in support of H.R. 10, a voluntary pension plan for the self-employed. Mr. Smith advocated the adoption of the bill saying:

> . . . It provides a needed incentive to sustain the growth of an important segment of the legal profession and of the community . . . the independent self-employed lawyer. . . . Lawyers consider it their duty to represent indigent defendants who are accused of crime and to take positions of leadership in the civic and political life of every community.

Mr. Smith appeared in behalf of the Junior Bar Conference and presented the resolution adopted by the Conference Assembly of the Junior Bar Conference at the Annual Meeting in August, 1960, at Washington, D. C., which supports H.R. 10 and urges its passage.

Standing Committee on Unauthorized Practice of the Law

Informative Opinion A of 1961

Pension and Profit Sharing Planning

Since the release of its opinion 1959 A on Estate Planning, this Committee has received requests from state and local Unauthorized Practice Committees for an opinion on Pension and Profit Sharing Planning and related subjects. These requests were prompted by certain advertising and solicitation on the part of various lay agencies engaged in the business of advising and planning with respect to these subjects.

Pension, profit sharing and similar concepts have developed in recent years out of the desire of employers to induce desirable employees to take employment or continue work with the employer until retirement. These plans may take various forms, including pension plans, profit sharing plans, group insurance, fringe benefits, stock bonus plans, deferred payment employment contracts, and other incentive compensation arrangements. Most, if not all of them, involve a contractual relationship between employer and employee, either directly, or with the employee as a third party beneficiary. Many complex tax problems arise in considering which type of plan not only best suits the needs and desires of the individual employer but also qualifies for tax benefits. Among such complex tax problems are: where, during employment, the employee contributes to a plan; where the trustee pays life insurance premiums or annuity premiums, or the employer pays life insurance premiums; where the employee withdraws money or company stock from the plan or is entitled to withdraw funds but does not; where the plan terminates and the employee receives a lump sum; where the company merges or reorganizes and the employee then terminates his employment; or when a pension plan changes from insured to trusteed. Various tax problems also arise upon the employee's resignation or discharge when he receives a lump sum, installments of income beginning immediately or at a set age, or receives a deferred annuity contract or life insurance policy or company stock. Similar tax problems arise in connection with the employee's death before retirement, at severance of employment on account of disability and upon retirement.

Thus a specific plan, in itself a legal instrument, must be prepared for the employer, drawn with careful consideration as to whether it qualifies under federal tax laws and regulations. Often a trust instrument is also prepared to implement the plan. The following steps usually involved in connection with a plan are typical:

(1) The employer either as a result of aggressive advertising or of personal solicitation by the "consultant" becomes interested.

(2) Once the prospect is interested, the "consultant" gathers information relative to the employer's general objectives, the amount of money he can spend and detailed information as to the age, compensation, years of service, and other data respecting each employee.

(3) Various plans are outlined to the employer and the "consultant" points out the advantages and disadvantages of each, including accounting, financial and tax problems involved. The choice of plan and certain details to be included usually depend upon the "consultant's" advice as to whether or not the plan will finally qualify for tax benefits.

(4) After a decision as to the type of plan, the plan itself must be drawn. It contains rules for eligibility, benefit provisions, including retirement, death, disability and severance benefits, and provisions concerning termination of the trust, administration of the plan, investment provisions and the like.

(5) The plan and trust agreement (if there is to be one), are presented to the employer and, generally, to the trustee for comments and revisions.

(6) In many instances, preliminary conferences are held with the Internal Revenue Service to discuss problem areas involved in a particular plan.

(7) The necessary corporate papers for adopting the plan and placing it into effect must be drawn.

(8) The plan in final form, together with necessary submission papers, is submitted to the Internal Revenue Service for approval. If the plan is for a bank or other institution regulated by state or federal statute, clearance must also be obtained from the proper regulatory office.

(9) The decision is made by the employer and his advisers as to when the plan should be put into effect.

(10) If questions arise as to qualification on the part of the Treasury Department after the plan has been submitted, a conference must be scheduled with the Treasury Department representative to discuss necessary changes in the plan.

(11) Following qualification of the plan and installation of the plan, questions invariably arise from time to time concerning interpretation of the provisions in the plan, deductibility of excess contributions made to the plan, permissibility of suspending contributions in a bad year, etc.

As we pointed out in the Estate Planning opinion, corporations, laymen, and lay agencies are prohibited from practicing law directly and from practicing law indirectly by hiring lawyers to practice for them. Also, as held in *State Bar Association* v. *Connecticut Bank and Trust Co.*, 145 Conn. 222, 140 A. 2d 863, 69 ALR 394 (1958), a corporation may disseminate, as by means of a publication, general information with respect to various laws, but may not undertake to apply the law to the specific situation of a prospect without becoming engaged in the unauthorized practice of law. Nor may a corporation, layman or lay agency, under the guise of disseminating general information, lead a prospect to

believe that he may or should come to the corporation, layman or lay agency for guidance on the law, or that legal advice, including legal advice in the field of Pension and Profit Sharing Planning may properly be obtained from the corporation, layman or lay agency as well as from the lawyer. Nor, as was held in *In re Bercu*, 299 N.Y. 728, 87 N.E. 2d 451 (1949), *Gardner* v. *Conway*, 234 Minn. 468, 478, 48 N.W. 2d 788, 795 (1951), and *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, 186, 52 N.E. 2d 27, 35 (1943), may such corporation or lay agency hold itself out as, or act as, "a tax consultant". Nor may they give specific advice concerning the effect of tax laws upon any specific contract, trust, planning or other document involved in pension, profit sharing and other plans.

Similar to the observation we made in the Estate Planning opinion, certain lay activities geared to motivating a prospect to do something about his affairs in the way of providing pension, profit sharing and other plans for the benefit of his employees may be in the public interest, provided these activities do not invade the practice of law. Thus a general discussion with the employer of various types of employee benefit plans, which employee shall be covered as a matter of policy, the cost, whether the employee shall contribute something or the employee all, retirement dates, death benefits, the funding of the plan *(i.e.*, whether on a "pay-as-you-go" basis or through insurance) and other factors of a strictly financial and economic nature is proper, provided that no legal advice concerning particular plans or their eligibility under the tax laws is given.

When, however, the "consultant" advises the employer that a specific plan is adapted to the latter's particular circumstances; prepares a plan embodying data gathered from the employer and represents the plan as adequate to the employer's particular circumstances; advises that such particular plan qualifies for tax benefits under federal tax laws and regulations; draws a trust instrument as a part of a plan; gives specific advice regarding the effect of the tax laws and other laws upon the employer's contributions, upon withdrawals from the fund during employment and upon the employee's resignation, discharge or death or upon methods of funding the plan; represents the employer in conferences with the Internal Revenue Service regarding qualification of the proposed plan, or any changes therein, under the tax laws and regulations; prepares corporate documents putting a plan into effect; or, after a plan is adopted, advises as to the proper interpretation of the plan, deductibility of excess contributions, suspending contributions in a bad year, and the like, then he engages in the practice of law.

As a specific example, if a "consultant" advises or draws a particular pension plan calling for a yearly contribution by the employer to be paid through a trust administered by a bank or trust company as trustee, and represents that such plan qualifies under the tax laws and regulations and advises that the employer is entitled to take an immediate tax deduction for its contributions but that the employee's tax is postponed until he receives the benefits of the plan, this is as surely the practice of law as when the lawyer advises his client respecting the same matters.

In summary, if corporations, laymen or lay agencies attempt to give legal advice or render legal services in these fields, either directly or through lawyers, they become engaged in the unauthorized practice of law. Nor may they solicit the legal work involved and then hire lawyers to perform it. In addition, a corporation, layman or lay agency may not submit to a prospect a form of Pension or Profit Sharing Plan, or other employee benefit plan, or any portion thereof, as suitable or possibly suitable to the prospect's needs, whether or not adaptation or review by a lawyer is also suggested. Nor may it undertake to advise a prospect that a particular type of plan, or any portion thereof, is suited to the prospect's situation, will save taxes, or has certain advantages under the Internal Revenue laws and regulations or any other branch of the law. And it may not avoid this result by stating that any such plan, or advice, is submitted subject to review by the customer's own attorney.

The Committee views with mounting concern, and roundly condemns, advertising by lay agencies offering complete services in the design, installation and administration of pension and profit sharing programs and other employee benefit plans. Illustrating the length to which such lay agencies aggressively push their services in this field is a portion of a letter from a self-styled "consultant" spelling out the services it will render:

> After the plan was approved by your Board of Directors, we would then handle all the installation of the plan, such as drafting of the trust instrument, drafting of employee booklets, draft of Board resolution, submission to the Internal Revenue Service, preparation of an administration manual, establishment of records for employees, allocation of employees' benefits, preparation and mailing statements to employees each year, preparation of all necessary tax schedules and forms for the Labor Department and any actuarial valuations that might be required. This would also be done on a fee basis which we would discuss after your acceptance of a plan.

We note also the following description of services to be supplied by certain mutual funds:

> *Pension and profit sharing plans for small firms:* An easy way to set these up is now being made available through several mutual funds. Firms with as few as 3 or 4 employees or as many as 100 can get in on it. The mutual funds furnish everything . . . forms, schedule of contributions, accounting methods . . . a big saving on consultants, legal fees, paper work.
> *Tax savings* apply to these plans just as to big company plans. And small firms can give their employees the same advantages as the bigs. Write us if you want names of some mutual funds that offer these plans.

Some of the advertising makes no mention of the use of the customer's own lawyer at any stage of the proceedings. Some advertisers offer to prepare all necessary documents which then must be "approved" by the customer's counsel. The net effect of this advertising is to lead the public to believe that the consultant does the whole job and that the lawyer is either unnecessary or, at the most, need be

called in only to "rubber stamp" the documents prepared by the lay agency. Moreover, some salesmen for mutual funds, in attempting to sell their investments to small companies, often offer a complete package which includes a set plan, a trust agreement and other previously prepared documents, without regard to the individual requirements of the particular prospect.

The relationship between solicitation of legal work and unauthorized practice is always illuminating. Indeed, unauthorized practice is nearly always undertaken on the foundation of solicitation of legal work by a lay agency. Yet it is fundamental that lawyers cannot solicit Pension or Profit Sharing work, or any other type of legal work. Also, it is well recognized that the prohibition against solicitation and advertising enforced upon lawyers is vitally necessary in the public interest, and not something to be taken lightly. But it would be futile to try to protect the parties by prohibiting lawyers from solicitation of legal work, and, at the same time, to tolerate such solicitation by the wholly unqualified, unauthorized practitioner. Moreover, the public would not be protected if this prohibition were circumvented by permitting corporations, laymen and lay agencies to claim legal competence in these fields at the very same time that lawyers are forbidden to advertise it, or to solicit the legal work involved and then hire lawyers to perform it. To protect the public, the substance of the prohibition against solicitation of legal work must be enforced against laymen as well as against lawyers and not undermined through subterfuge. Thus, it follows that a holding out on the part of a corporation, layman or lay agency to perform or furnish legal services in these fields, or as willing to engage in or be consulted with respect to "Pension Planning", "Profit Sharing Planning", or something similar, is practice of law.

F. Trowbridge vom Baur, *Chairman*

Wayland B. Cedarquist

Jonathan F. Ells

Terrell Marshall

William L. Murphey

H. H. Perry, Jr.

Raymond Reisler

June 17, 1961

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1962 Annual Meeting and ending at the adjournment of the 1965 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

A State Delegate will be elected in New York to fill the vacancy for the term ending at the adjournment of the 1964 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1962 must be filed with the Board of Elections not later than March 9, 1962. Petitions received too late for publication in the March issue of the *Journal* (deadline for receipt February 1) cannot be published prior to distribution of ballots, which will take place on or about March 19, 1962.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 9, 1962.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held not later than fifteen days after the time for filing nominating petitions expires.

Board of Elections
John R. Dethmers, Chairman
Harold L. Reeve
Fred A. Smith

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

COPYRIGHT: Over the past several years the Patent, Trademarks and Copyrights Subcommittee of Senate Judiciary (of which Senator O'Mahoney was so long Chairman and of which Senator McClellan is Chairman today) in twelve Committee prints has published thirty-four studies by the Library of Congress on the Copyright Law. These studies were directed by L. Quincy Mumford, Librarian of Congress, and Abraham L. Kaminstein, Register of Copyrights, Copyright Office, The Library of Congress. Since 1790 our copyright law has gone through only three general revisions, 1831, 1870 and 1909 and the "act of 1909 . . . is still essentially the law today".

Congressman Edwin E. Willis of Louisiana, as Chairman of the Copyrights Subcommittee No. 3 of House Judiciary and Chairman Emanuel Celler of New York, as Chairman of the full Committee, on July 10, 1961, have now made these copyright studies available in one convenient report of 160 pages along with recommendations for change. It is entitled "Copyright Law Revision" and you can obtain it free from your Congressman or Senator, or for forty-five cents from the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

Mr. Kaminstein in his foreword tells us that "Although it represents our best thinking at the present time, it is not intended as the final word on any particular problem or on the revision program as a whole" and Chairman Celler states the report is issued without approval or disapproval to invite "comments and suggestions".

Appendices A and B are interesting. B is a Summary of Recommendations but A tells us the authors of the thirty-four studies were: A. A. Goldman, W. M. Blaisdell, Walter Derenberg with staff members of the *New York University Law Review*, William S. Strauss, Professor Harry G. Henn of Cornell Law School, Vincent A. Doyle, George D. Cary, Marjorie McCannon, Barbara A Ringer, Joseph W. Rogers, Caruthers Berger, Arpad Bogsch, Borge Varner, Alan Latman, Professor Benjamin Kaplan, Marcia Kaplan, Elizabeth K. Dunne, Professor Ralph S. Brown of Yale Law School, William O'Brien, Herbert Turkington, William S. Tager and James L. Guinan. Publication is a great tribute to the scholarship labors of these unsung copyright lawyers.

In his preface, Abraham L. Kaminstein states that the report and the studies that led up to it are a testimonial to Arthur Fisher, the former Register of Copyrights who died on November 12, 1960, after planning the entire general revision program. Since copyrights today include architecture, art, choreography, sound recordings, library photocopying, performing rights, jukeboxes and even Jack Benny's laugh, lawyers with clients who have copyright problems should send at once for this Report of the Register of Copyrights.

EDDIE MORGAN: For June, 1961 (Vol. 14, No. 3, $2.00, Nashville 5, Tenn.) the *Vanderbilt Law Review* publishes a "Symposium on Procedure and Evidence in Honor of Edmund M. Morgan".

To this issue these very distinguished scholars contribute articles: Professor John M. Maguire ("The Hearsay System") and John T. McNaughton ("Judicial Notice") of Harvard Law School; Professors Judson F. Falknor ("Vicarious Admissions") and Milton D. Green ("Uniform Rules for the Courts of Appeals") of New York University Law School; Professor V. C. Ball of Ohio State Law School ("Probability Theory"); Professor Jack L. Weinstein of Columbia Law School ("Bifurcation of Jury Negligence Trials"); Professor Edward W. Cleary of the University of Illinois Law School ("*Hickman* v. *Jencks*"); Professor James R. Richardson of Kentucky Law School ("*Rochin* and *Breithaupt*"); Professor Fleming James, Jr., of Yale Law School ("The Complaint"); Professor David W. Louisell of the University of California Law School ("Criminal Discovery"); and, Professor Thomas F. Green, Jr., of the University of Georgia Law School ("Federal Jurisdiction in Personam").

Of course, the articles by Professors McNaughton and Cleary greatly impressed me. McNaughton cites (footnote 2, page 795) the piece on judicial notice that Bill Landis, Bob Shaad and I did in 2 *Stanford Law Review* 664, and Cleary, citing (footnote 49, page 872) my recent C. U. piece (7 *C.U. Law Review* 91) says it reports "graphically" how the Jencks legislation was passed. Delighted I am to see that McNaughton rejects the Thayer-Wigmore view of judicial notice under which a court could notice disputable matters and in the new Wigmore will advocate the Morgan-McCormick-Keeffe view that "a fact, once judicially noticed, is not open to evidence disputing it".

Even though there was no citation of any of my copy, I also read and enjoyed the pieces by Professors Green and Richardson. As Dean George Stephens of the University of Washington Law School, Herbert Clark, of San Francisco, and other members of our Association know, there is need for a national bar examination for federal courts. It is good that Professor Green as an Associate Director of the Institute of Judicial Administration is tackling the job of uniform rules for Courts of Appeal. After he gets done, perhaps he and Professor Shelden Elliott will do the same for the federal district courts

where requirements for admission to practice and rules of procedure continue to differ. Indeed, some districts do not even publish rules. And never will I forget the day I was admitted to practice in the Eastern District of New York and Sam Ballin made me memorize both the Constitution and the Declaration of Independence. It was a wicked subway ride.

The article by Professor Richardson collects cases such as *Breithaupt* and *Rochin* where the police extract evidence from your body for use in court. Had I known, I would not have read it. People (Grenville Sewell, Andy Goerner and Katie O'Dea Connelly) come miles to tell me about operations and tragedies and I regularly faint from it. I am glad to say I survived a reading of Richardson's effort with only a slight fever. It is a valuable collection of cases and will be much more so because of the decision of the Supreme Court in *Dollree Map* v. *Ohio*, 6 L. ed. 2d 1081 (discussed by this department in the August issue, 47 *A.B.A.J.* 835, in connection with the piece by Professor Barrett of California Law School in *The Supreme Court Review* published for $6.00 by the University of Chicago Press, Chicago 37, Illinois).

I am sure that when time permits me to read the other articles I will find them as interesting (if not so terrifying as Richardson's).

But the *pieces de resistance* in this symposium are its forewords, of which there are half a dozen. Each is what Professor Elmer Million of New York University would call "a little gem".

In Foreword One, Mr. Justice Felix Frankfurter tells us why he has become so fond of Eddie Morgan. Morgan was "an ogre" to Frankfurter when, as Note Editor of the *Harvard Law Review*, he blue pencilled second-year student Frankfurter's copy. Their difficulties continued after law school:

> Many years later, after we had become fast friends—he was at Yale and I at Harvard—the Harvard Law School Faculty invited Morgan to join it. For reasons that are here irrelevant as is their soundness, I opposed the call on the ground that the needs of the Harvard Law Faculty at the time were for a reinforcement different from the interests and qualities that Morgan would bring. I wrote him of my views, adding that while I had to vote against calling him no one would more eagerly welcome him to Cambridge than I. How many men would have deemed such conduct on the part of a friend at least quixotic, if not indeed negativing friendship? Not so Eddie Morgan. He respected my action on the basis of my thinking. Not only was there no bruise to our friendship; the incident deepened it.
>
> Need I say more to convey my affection and my admiration for Eddie Morgan.
>
> FELIX FRANKFURTER

I know what the Justice means. While I have made the mistake of praising Eddie *ad nauseum*, I once remarked adversely about certain compromises with his principles he made in drafting the Code of Military Justice. Instead of getting mad, the rascal laughs and kids me about it. What can you do with a fellow like that?

In Foreword Two, Judge Sam L. Felts of the Supreme Court of Tennessee writes in appreciation of Eddie's annual article with respect to Tennessee procedure and evidence. However, I think the Judge goes too far in saying as Cardozo said of Holmes that Eddie possesses "the art of packing within a sentence the phosphorescence of a page" (page 709). Judge, there are limits and we have to live with Eddie.

My good friend, Professor Charles T. McCormick, in Foreword Three rightly accords to Morgan an Evidence place with Thayer and Wigmore and he should have added with McCormick. Professor McCormick points out how the Uniform Rules of Evidence of which he is the draftsman but follow the spade work of Morgan's studies for the Commonwealth Fund and the American Law Institute.

Foreword Four is by the Cardozo Professor at Columbia Law School, Harry W. Jones. His tribute relates to the fine work Eddie has done for Foundation Press' University Case Book Series. Eddie has championed competing case books in the same field and new approaches in untried areas. Loren Darr and John Tinnelly have been lucky indeed to have Eddie advise them.

His old friend and former colleague, Professor Austin W. Scott of Harvard Law School, writes Foreword Five. It is an affectionate tribute to Eddie's intellectual integrity and his good humor.

The best of the six forewords, however, is the sixth and last by Dean John W. Wade. It is priceless.

First, he tells how at Vanderbilt everyone—faculty, students, judges and lawyers—call this distinguished Emeritus Professor of Harvard "Eddie". It reminds me of Cornell's "*Emer Itis*" Professor Gustavus Robinson that even

my daughter, Mary Ellen, called "Robbie" with equal affection.

Dean Wade spins three priceless Morgan yarns.

1. Two alumni of Harvard Law School at the close of World War II were in Okinawa talking about "that tough little bastard in the Civil Procedure class" (page 722). One turned to the other and said, "When we get back stateside, will you join me in finding Morgan's grave and spitting upon it?" The wiser one replied, "Not on your life, Buster. Once I get out of service, I'm not going to stand in line for anything" (page 722).

2. Five or six years ago, five Vanderbilt law students decided to avoid Eddie Morgan and take Evidence in Summer School at Colorado Law School in Boulder from Professor George Demion. As they entered class, Eddie Morgan was on the rostrum. George Demion had sustained a fatal heart attack and in the emergency Eddie Morgan had rushed to the aid of Dean King of Colorado. Two of the boys stuck out Evidence with Eddie at Colorado. Two dropped out but took the course with Eddie at Nashville. All four passed.

3. The third and last story, Dean Wade claims as his own. He tells it this way:

> Mr. Morgan graduated from Harvard Law School and engaged in the practice of law in Duluth. He did so well that after seven years he was invited to join the faculty of the University of Minnesota. After five years there he became a good enough teacher to be invited to Yale. He kept improving and after eight years at Yale he was good enough to be invited to Harvard. But at Harvard it took him 25 years to become good enough to be invited to Vanderbilt.

The students at Vanderbilt and their able faculty adviser to the law review, Professor Thomas G. Roady, Jr., are to be congratulated for this timely and deserving tribute to "Eddie". In their dedicatory piece, they say, "The real coup in the organization of the issue was persuading Professor Morgan to give us his brief critique of the role of a reformer of the law."

This he does, and beautifully, in the opening article in the Symposium. It is entitled "Practical Difficulties Impeding Reform in the Law of Evidence".

His discussion of his inability to convince lawyers of the absurdity of the deadman's statute (especially New York lawyers who languish under that monstrosity known as Section 347 of the Civil Practice Act) should be made compulsory reading for all bar association legislative reform committees.

With horror, it made me recall the futile effort Bill Greer, Torrance Brooks and I made at Oneonta, New York, to get that judicial district on record as opposed to the deadman's statute (see *"86 or 1100"* in 32 *Cornell Law Quarterly* 253). Like Morgan's, our effort was defeated two years later at Owego, New York, on the motion of a corporate lawyer from Elmira, New York, now deceased, who to my personal knowledge never tried a lawsuit of any kind. For some reason unknown to me, an attack on 347 of the Civil Practice Act was then regarded as communistic and I infer from Morgan's article still is.

What a guy! What a splendid symposium issue on Evidence!

LANDIS REPORT: In a different kind of way from Carl McFarland in the April, 1961, *Virginia Law Review*, Milton M. Carrow of the New York Bar views the Landis Report in the April, 1961, issue (Vol 29, No. 4, price $2.00) of the *George Washington Law Review* of Washington, D. C. Lawyer Carrow sees it from the point of view of our Association and he does an admirable job of hitting the high spots of the Landis Report with a minimum of detail.

Pointing out that Jim Landis considers only seven agencies (ICC, CAB, SEC, FTC, FCC, FPC and NLRB), he questions the omission of over forty others, including the Federal Home Loan Bank, the AEC and the Federal Maritime Board, of which Landis said, "in its quasi-judicial aspects it suffers from a lack of settled public procedures" (page 723).

Mr. Carrow believes the "solutions" offered by Mr. Landis "reflect a change" in his views from the Hoover Task Force of which he was a member. He attributes this to the fact that the report is an outgrowth not only of Landis' ideas but also studies by the congressional committees, reports by the bar associations and the many law review articles on the administrative process.

As Mr. Carrow sees it, there are three basic approaches:

One, the Landis way, leading to consolidation and coordination of policy-making power, at least in the economic regulatory process, in the Chief Executive and his Office. Two, the bar association way, toward repair of procedural defects together with independent procedural oversight of all the administrative agencies. Or three, the Brownlow-Hector way, a course which branches off into policy-making, adjudication and prosecuting by-ways that could cross and re-cross each other.

Unlike Carl McFarland, Milton Carrow considers the Landis way objectionable in centering too much power in the President (page 736). Indeed, he even dares to question the Landis assumption that the constitutional provision directing the President faithfully to execute the laws, "confers any power at all on the President" (page 727). He also raises the point as to "the extent to which executive immunity from both legislative investigation and judicial review can be invoked by the President" (page 727).

Carrow cheers the Landis Report for the manner in which it scrutinizes "the dismaying failures of intra- and inter-agency policy making" (page 728) and he recognizes that only the able and experienced Landis could write as he did.

Carrow calls attention to our Association's long and to date almost futile fight for reform of these administrative agencies. In 1941, the Attorney General's Committee asked in vain for an independent Office of Federal Administrative Procedure (page 732). But on February 6, 1957, an Office of Administrative Procedure was created in the Department of Justice under the Attorney General. It collects statistics (page 732).

However, on August 30, 1960, President Eisenhower commissioned Judge E. Barrett Prettyman to organize an Administrative Conference of the United States, and everyone welcomes this. Its Executive Secretary is to be the Attorney General's Director of the Office of Administrative Procedure.

Our Association wants an independent Office of Federal Administrative Procedure but "Dean Landis' Report now makes different suggestions" (page 733):

> It first endorses Judge Prettyman's concept of an Administrative Conference, and states that "it could achieve all that the concept of the Office of Administrative Procedure envisaged by the Hoover Commission and endorsed by the American Bar Association hoped to accomplish, and can do so at a lesser cost and without the danger of treading on the toes of any of the agencies".
>
> He proposes, however, that a Secretariat to the Conference be created, to which should be transferred the duties now performed by the Office of Administrative Procedure of the Department of Justice, and also the duties now exercised by the Civil Service Commission with respect to the qualifications and grading of hearing examiners and the recruitment of lawyers for the government.
>
> In addition, Dean Landis recommends that there be created "within the Executive Office of the President with appropriate powers an Office for the Oversight of Regulatory Agencies which will assist the President in discharging his responsibility of assuring the efficient execution of those laws that these agencies administer."

Mr. Carrow adds:

> It is hoped that, for the present, we will not have additional proposals of this kind among which we have to choose. However, I think the issue boils down to a choice between the Office of Oversight in the Executive Office and the independent agency; for everyone will probably agree that Judge Prettyman's Administrative Conference will perform a useful consultative function.

In his report, Dean Landis also suggests the "device of public counsel". As to this, Mr. Carrow comments:

> Finally, a word about the "public interest", and particularly, the interest of the public. The Report reflects the widespread concern that the agencies have become "industry oriented", or highly institutionalized and therefore relatively impervious to individual interests. Although the immediately affected interests are fully represented both in and out of the agency, the interest of the public is inadequately represented. Codes of ethics may be helpful to alleviate some of the most undesirable aspects of excessive contacts between the agencies and the in-

terests they regulate. But this is clearly not enough. Consequently Dean Landis proposed the encouragement of the "device of the public counsel, the effectiveness of whose function is in almost direct relationship to his capacity to irritate the agency members."

A similar suggestion, of broader scope, was made by Professor Walter Gellhorn at the hearings before Senator Carroll's subcommittee. He pointed out that in all four Scandinavian countries there is a high ranking government official, called the "Ombudsman", who has "power to look into administrative conduct of particular cases or to make suggestions about how a problem should be handled." He suggested that the Director of the proposed independent Office of Administrative Practice should have similar powers.

"I think that the director of that office should be a person of great stature and significant power, with the capacity to obtain all papers and files bearing on any matters that he was concerned with looking into; and indeed, I would go so far as to consider conferring on him the authority, if he thought it needed, of going to court, presenting the case of an individual complainant who might himself be unable to press a matter through the courts."

With these many well-documented proposals before us, and with the impetus given by the Landis Report, we may well expect that Congress, the agencies and the President will do something about them.

This is a valuable article upon one of the most important public documents of our day.

COLUMN CORRESPONDENCE: With respect to the piece in this department on *Mapp* v. *Ohio*, 367 U. S. 643, which appeared in the August, 1961, issue of our *Journal*, Ralph T. Catterall, Commissioner, State Corporation Commission, Commonwealth of Virginia, writes from Richmond as follows:

"The Practicing Lawyer's Guide" is the brightest spot in the *Journal*.

At page 836, you say of a land mark decision: "It foreshadows the application of all the provisions of the Bill of Rights across the board to the states. . . ."

I wish you or Mr. Justice Black or somebody would write a piece explaining in detail what would happen if the Second and Seventh Articles of the Bill of Rights were applied to the states. It might be a good topic for the Ross Essay Prize.

If they applied in *haec verba* across the board we couldn't have any sentimental nonsense about "balancing" the right of the citizen to carry arms against the right of the state to discourage robbery.

To this, your department editor replied as follows:

Thank you for your letter of September 5 and your kind words about my crazy column.

I have refreshed my recollection of the Second and Seventh Amendments and confess they present problems. My good friend, the late Fitch Stephens, Esq., leading lawyer and Dean of the Ithaca, New York, Bar, to his dying day carried a knife around his neck and pistol in a holster at his waist. In fact, at his death, between his law office and his home, we found an arsenal. But Fitch, being a man of principle and, like you, one who reads, asserted a right to his guns under the Second Amendment. He, therefore, refused to take out a license under the New York Sullivan Law for the possession of his weapons. His contention was that the Second Amendment authorized it.

I question the wisdom of the Sullivan law anyway. The recent terrible murder of that New York psychiatrist indicates you can be nutty as a fruit cake and walk into a store in New York and buy a gun—maybe a cannon.

I do not believe the Seventh Amendment presents so serious a problem. I see Mr. Justice Dooley in the future telling us that the Seventh Amendment merely requires juries with at least a two-thirds verdict in *civil* cases, and waivers are o.k. He will tell us that the Seventh Amendment has contemplated less than unanimous juries since Magna Charta. And we shall believe him because we want to.

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